88-1259

FILED
JAN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

BOOTH GARDNER, et al.,

Petitioners,

v.

LANFORD D. TRIBBLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH O. EIKENBERRY
Attorney General
WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record
GLENN L. HARVEY
Assistant Attorney General

7th Floor, Highways-Licenses Building
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

STATE PRINTING PLANT OLYMPIA, WASHINGTON

QUESTIONS PRESENTED

I. Can prison officials who develop a prison policy, which is not unconstitutional on its face, and the employees who carry out that policy, be denied qualified immunity from suit on the basis that the policy was motivated by an improper purpose absent any direct evidence of such a purpose?

II. Can a prison staff member be held liable under 42 § 1983 for creating or carrying out a prison policy, which, although not unconstitutional on its face, was allegedly tainted by an improper purpose, absent any evidence that the actions of that staff member were motivated by the claimed improper purpose?

LIST OF PARTIES

The parties to the proceeding below were the following Petitioners, who were aligned as Defendants-Appellants below: Booth Gardner, Governor of the State of Washington; Amos Reed, former Washington Department of Corrections Secretary; Robert Trimble, Washington Department of Corrections Deputy Secretary; W.L. Kautzky, Director of the Division of Prisons; James C. Spalding, Deputy Director of the Division of Prisons; Lawrence Kincheloe, Washington State Penitentiary Superintendent; R. Zabor, Washington State Penitentiary medical staff; and Correctional Officers Sergeant Snell, J. King, J. Christy, P. Edwards, R. Jones, and R. Hansen.

Respondent Landford D. Tribble, an inmate serving a sentence at the Washington State Penitentiary at Walla Walla, was aligned as the Plaintiff-Appellee below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
REASONS FOR GRANTING THE WRIT	5

I. The Ninth Circuit Court of Appeal's refusal to require that a § 1983 plaintiff present some "direct evidence" of a defendant's improper purpose in order to defeat the defendant's motion for summary judgment based on qualified immunity flies in the face of recent decisions of this Court. The decision is in conflict with decisions of the Sixth and District of Columbia Circuits. Direction from this Court regarding the "direct evidence" issue is necessary in order to effectuate the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

II. The Court of Appeals has departed from well settled law by holding that an individual prison staff member can be subjected to the rigors and expense of a trial based on a claim that a particular prison policy was implemented for an "improper purpose" even where no evidence was adduced as to the role he or she played in creating or implementing the policy, or that he or she personally was motivated by the alleged improper purpose.

CONCLUSION 13

APPENDICES ..... A, B

TABLE OF AUTHORITIES

CASES

Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987) 4, 6, 7

Anderson v. Liberty Lobby, ___ U.S. ___, 106 S.Ct. 2505 (1986) 11, 13

Brown v. Johnson, 743 F.2d 408 (6th Cir. 1984), cert. denied, 469 U.S. 1215 (1985) 8

Bruscino v. Carlson, 654 F.Supp. 609 (S.D. Ill. 1987), aff'd. 854 F.2d 162 (7th Cir. 1988) 3

Celotex Corp. V. Catrett, ___ U.S. ___, 106 S.Ct. 2548 (1986) 4, 5, 11, 12, 13

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 3, 4, 5, 6, 7, 8, 9, 10

Jeffries v. Reed, 631, F.Supp. 1212 (E.D. Wash. 1986) 3

Jones v. North Carolina Prisoner's Union, 433 U.S. 119 (1977) 7

Kent v. Johnson, 821 F.2d 1220 (6th Cir. 1987) 7

Leer v. Murphy, 844 F.2d 628 (9th Cir. 1988) 11

Martin v. District of Columbia Metro Police Department, 812 F.2d 1425 (D.C.Cir.), vacated in part, 817 F.2d 144 (D.C.Cir.) reinstated sub nom., *Bartlett v. Bowen*, 824 F.2d 1240 (D.C.Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1121 (1988) 4, 9, 10

Michenfelder v. Sumner, 860 F.2d 328 (9th Cir. 1988) 7

Mitchell v. Forsyth, 472 U.S. 511 (1985) 3, 6

O'Lone v. Estate of Shabazz, ___ U.S. ___, 107 S.Ct. 2400 (1987) 9

Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988) 5, 9, 10

Pueblo Neighborhood Health Centers v. Losavio, 847 F.2d 642 (10th Cir. 1988)..... 12

Tribble v. Gardner, 860 F.2d 321 (9th Cir. 1988) (Appendix A)..... 1

Turner v. Safley, ___ U.S. ___, 107 S.Ct. 2254 (1987) 4, 5, 7, 8, 10

Wood v. Strickland, 420 U.S. 308 (1975)..... 4

STATUTES AND REGULATIONS

28 U.S.C. § 1291 ..... 1, 6

42 U.S.C. § 1983.....2, 5, 10

No.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

BOOTH GARDNER, et al.,

Petitioners,

v.

LANDFORD D. TRIBBLE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on October 25, 1988.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit has been published. *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988). It is reprinted as Appendix A. The unpublished order of the District Court, which was appealed to the Court of Appeals, is attached as Appendix B.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered a Judgment and Order on October 25, 1988 affirming the District Court's denial of Petitioner's Motion for Partial Summary Judgment.

Petitioners Booth Gardner, et al., invoke this Court's jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Eighth Amendment to the United States Constitution. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment to the United States Constitution, section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This case involves a challenge by a state prison inmate to a prison policy under 42 U.S.C. § 1983.[1] Plaintiff's challenge is not limited to a determination of the constitutional-

[1] Plaintiff's § 1983 action also challenges the specific application of the policy in question to him, as well as raising other issues. None of those issues are before the Court in this petition.

ity of the policy or the availability of prospective injunctive relief. He also seeks money damages from everyone in any way connected with that policy—starting at the top with the Governor who appointed the policy makers, the policy makers themselves, and ending with the line correctional staff hired to carry out that policy.

Defendants sought summary judgment on the basis that the policy is constitutional[2] or, in the alternative, that defendants are entitled to qualified immunity from suit for money damages[3] because the policy did not violate "clearly established rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982).

The District Court agreed that the policy is constitutional if aimed at a particularly dangerous class of inmates—in other words, it was not facially unconstitutional. However, the District Court denied summary judgment on the basis of Plaintiff's claim that the policy was created and implemented for a punitive—and therefore improper—purpose. The District Court found that Plaintiff's circumstantial evidence created an issue of fact as to the purpose of the policy.

Petitioners filed an interlocutory appeal pursuant to *Mitchell v. Forsyth*, 472 U.S. 511, 529-30 (1985). The Court of Appeals affirmed the District Court. Petitioners seek relief from the Court of Appeals' decision.

---

[2] The policy in question—requiring a search of the body cavities of dangerous inmates transferred into the prison's most secure housing unit—was approved at least in dicta by a different district judge. *Jeffries v. Reed*, 631 F.Supp. 1212 (E.D. Wash. 1986). The Sixth Circuit Court of Appeals has sustained a similar policy in a comparable high security federal prison, recognizing the need to prevent dangerous inmates from secreting weapons, drugs or other contraband in their body cavities. *Bruscino v. Carlson*, 654 F.Supp. 609, 620 (S.D. Ill. 1987) *aff'd.*, 854 F.2d 162 (7th Cir. 1988). Plaintiff's suit is one of approximately 120 pending in district courts in Washington relating to the same policy. The policy in question has, subsequent to the filing of this action, been changed—under current policy, body cavity searches are conducted only upon a showing of reasonable suspicion in individual cases.

[3] The issue of qualified immunity from injunctive relief is not before the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents a confluence of three lines of recent decisions from this Court, which, in the context of prison administration, work together and reinforce each other. In *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254 (1987), the Court admonished that proper deference should be granted to prison officials in their day-to-day administration of penal institutions. In *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987), the Court affirmed that government officials should be immune from liability for money damages under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), unless their conduct, when viewed against an objective legal reasonableness standard, violated rights which had been clearly established in a particularized sense. In *Celotex v. Catrett*, ___ U.S. ___, 106 S.Ct. 2548 (1986), the Court held that summary judgment should bar trial when there is a failure of proof on any element of a plaintiff's claim, even though there may be factual disputes as to other issues. The decision below is in conflict with each of these lines of cases, and undercuts the policies embodied in each.

2. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court eliminated the subjective prong of the qualified immunity test outlined in *Wood v. Strickland*, 420 U.S. 308 (1975). Since *Harlow*, the Supreme Court has not indicated how the *Harlow* standard should be applied when the government official's subjective intent is an element of the underlying claim.

In *Anderson v. Creighton*, *supra*, the Court held that the test against which the official's conduct is to be measured is one of "objective legal reasonableness" as to the particular conduct involved.

Below, the Court of Appeals did not require the plaintiff to produce any "direct evidence" of improper motivation to avoid summary judgment. This is in conflict with the "direct evidence" standard adopted by the District of Columbia Circuit in *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C.Cir.), *vacated in part*, 817 F.2d 144 (D.C.Cir.), *reinstated sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (D.C.Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1121 (1988), and

the Sixth Circuit in *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988).

3. The Court of Appeals also held that Tribble's failure to link any named defendant to the search or creation of the policy or to the claimed improper purpose was not fatal to his attack on the policy. This is in obvious contravention of the 42 U.S.C. § 1983 requirement that liability be predicated on the acts of a named defendant.

Denying summary judgment in the absence of any evidence to support an essential element of plaintiff's claim flies in the face of *Celotex*, *supra*.

4. The result of the Court of Appeals' decision will be to force prison employees to incur the expense of a trial for money damages to defend the purpose of a prison policy, even though there is no evidence that they personally possessed punitive intent while creating or applying the policy. This decision will result in federal courts being constantly embroiled in the management of the nation's prisons. Such involvement is in contradiction to the Supreme Court's teachings. *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254 (1987).

The Court, therefore, should accept review, not only to rectify an erroneous decision in contravention of this Court's rulings and in conflict with other circuit courts of appeal, but also to provide guidance to lower courts struggling with exploding § 1983 prison litigation.

REASONS FOR GRANTING THE WRIT

I. The refusal by the Court of Appeals for the Ninth Circuit to require that a § 1983 plaintiff present some "direct evidence" of a defendant's improper purpose in order to defeat the defendant's motion for summary judgment based on qualified immunity flies in the face of recent decisions of this Court. The decision is in conflict with decisions of the Sixth and District of Columbia Circuits. Direction from this Court regarding the "direct evidence" issue is necessary in order to effectuate the Court's holding in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), the Court held that "* * * government officials performing discretionary functions generally are shielded from liability * * *[if] their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The *Harlow* Court reasoned that if the law was not "clearly established," an official could not "* * * reasonably be expected to anticipate subsequent legal developments * * *". *Id.* at 818.

The *Harlow* Court sought to avoid the substantial social costs that would attend to the inquiry of a government official's subjective intent. *Harlow* 457 U.S. at 817. Finding that subjective inquiries are incompatible with the policy that insubstantial claims should not proceed to trial, the Court concluded that "* * * bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery." *Id.* at 817-18.

Harlow was followed by *Mitchell v. Forsyth*, 472 U.S. 511 (1985), in which the Court held that "* * * a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Id.* at 530. The Court reasoned that the qualified immunity entitlement "* * * is an *immunity from suit*, rather than an a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526, (emphasis added).

The Court's most recent explanation of the *Harlow* standard and its application was set forth in *Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034 (1987). The issue addressed in the *Anderson* decision was the level of generality at which the relevant legal rule will be deemed "clearly established" law. For example, since the right to due process is clearly established, it is possible that any action that violated due process thereby also violated "clearly established" law. However, the *Anderson* Court found that if the test of clearly established law were to be applied with such generality, it would undercut the "objective legal reasonableness"

test of *Harlow*. *Anderson* ___ U.S. ___, 107 S.Ct. at 3039.

The *Anderson* Court went on to affirm that the qualified immunity analysis does not require "* * * the inquiry into officials' subjective intent that *Harlow* sought to minimize." *Anderson* ___ U.S. ___, 107 S.Ct. at 3040. The test would still be primarily an objective one.

> The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's *subjective beliefs about the search are irrelevant*. *Id.* at 3040, (emphasis added).

The Court of Appeals' decision in this case flies in the face of these holdings. By refusing to require that an inmate plaintiff adduce some direct evidence of an allegedly improper purpose in order to overcome an qualified immunity defense, the Court of Appeals has subjected the decision making process of prison administrators to post hoc scrutiny by federal court juries—a result clearly contrary to the teachings of *Harlow* and *Anderson*.

The policy considerations which dictate a direct evidence standard, particularly in a prison environment, are substantial. In *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254 (1987), the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is *reasonably related* to a legitimate penological interest."[4] *Id.* at 2261 (emphasis added). The *Turner* Court found such a standard to be necessary "* * * if prison administrators * * *, and not the courts, [are] to make the difficult decisions concerning institutional operations." *Turner* quoting *Jones v. North Carolina Prisoner's Labor Union, Inc.*, 433 U.S. 119, 128, (1977).

---

[4] The *Turner* Court used very broad language which indicates the Court intended the "reasonable relation" analysis to apply to the scrutiny of all prison regulations. *See Turner* at 2261. Although *Turner* arose in a first amendment context, the circuits have applied the "reasonable relation" analysis in contexts others than first amendment. *See Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987), involving prisoner claims under the first, fourth, eighth, and fourteenth amendments; *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988), *Turner* applied in a fourth and eighth amendment context.

The "reasonable relation" standard of *Turner v. Safley* requires a "logical connection" between a disputed policy and a legitimate penological objective. *Turner* ___ U.S. ___, 107 S.Ct. at 2264.[5] If prison staff who create or implement a "logically connected" policy can be denied qualified immunity, and thus forced to trial, by mere inferential or circumstantial evidence of punitive purpose, then all prison policies will easily be forced to issue *at trial*. Obviously, at trial, a record will be created which will be examined on appeal and the *Turner* "logical connection" requirement will become the "searching examination of the record" found inappropriate in *Turner*. *Id.* at 2264.

Under the decision below, an inmate plaintiff can produce circumstantial evidence (not necessarily directed at a named defendant) from which an inference could be drawn that a policy has a punitive purpose. The defendants will be forced to trial regardless of the merits of the suit as to their personal culpability. This result is obviously contrary to the teachings of *Harlow* and *Turner*. It will not be unexpected if convicted felons soon learn to routinely allege that a policy to which they object was created for a punitive purpose, even though the policy is logically connected to a legitimate penological objective. Under the evidentiary standard which the Court of Appeals has applied, those cases will be easily forced to trial by prison inmates.

If the claims of prison inmates can withstand summary judgment on the basis of such very limited evidence of a named defendant's punitive intent, as in this case, the qualified immunity defense will vanish for prison officials. Moreover, the inquiry into the motivation of prison officials will require the courts constantly to involve themselves in matters that this Court has said to be committed to the consid-

[5] The majority in *Turner* concluded that a logical connection is required, rather than an examination of the record to determine whether sufficient proof existed that, in fact the regulation at issue was necessary. *Turner* at 2264. In *Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) *cert. denied*, 469 U.S. 1215 (1985), the court presaged the *Turner* "logical connection" analysis when it stated "Moreover, prison officials when making these types of decisions, need not demonstrate an *actual* danger in order to support the reasonableness of their determinations. It is enough to show that a *potential* danger exists without the restrictions of a challenged prison regulation." *Brown* at 413.

ered judgment of prison administrators. *O'Lone v. Estate of Shabazz*, ___ U.S. ___, 107 S.Ct. 2400, 2404 (1987).

The decision below conflicts with the decision in *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1435 (D.C.Cir.), *vacated in part*, 817 F.2d 144 (D.C.Cir.) *reinstated sub nom., Bartlett v. Bowen*, 824 F.2d 1240 (D.C.Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1121 (1988). There, the D.C. Circuit held that when a court inquires into a defendant's motivation "some direct evidence that the official's actions were improperly motivated must be produced if the case is to proceed to trial." *Martin*, 812 F.2d at 1435. Under *Martin*, the plaintiff, in order to avoid dismissal before a trial, must come forward with more than inferential or circumstantial support for the allegation of unconstitutional motive.

The *Martin* court held that the Supreme Court's strong condemnation of insubstantial suits against government officials compelled the application of a standard more demanding of the plaintiff when public officer defendants move for summary judgment on the basis of their qualified immunity. *Martin*, 812 F.2d at 1435. *Martin* found that the more exacting "direct evidence" standard was necessary to avoid "* * * precisely the burden *Harlow* sought to prevent." *Id.* at 1435.[6]

The Sixth Circuit has also required that a plaintiff show direct evidence that an official's action was improperly motivated in order to defeat a summary judgment motion based on qualified immunity. *Poe v. Haydon*, 853 F.2d 418, 432-433 (6th Cir. 1988). The *Poe* case involved alleged violations of the equal protection clause and the due process clause of the fourteenth amendment in the context of sexual harassment and discrimination.

The *Poe* court concluded that under *Harlow*, it was proper to consider the actors' intent. *Id.* at 431-432. However, the *Poe* court agreed with the *Martin* Court that the plaintiff must present direct evidence that an official's action was im-

---

[6] The court below attempted to distinguish *Martin* on the basis that the court there dealt with a claim that individual defendants acted with an unconstitutional purpose, whereas "Tribble asks [the Ninth Circuit] to examine the purpose of the policy." *Tribble*, Appendix A, p. 12. This is pure sophistry. The policy has no life of its own—and thus no purpose other than that of those who created it or are charged with carrying it out.

properly motivated to defeat a summary judgment motion based on qualified immunity. *Poe*, 853 F.2d at 432.

The *Poe* court further indicated how such a standard should be utilized. If there is a genuine issue of material fact considering a defendant's motivation *and* there is *direct* evidence that the defendant was improperly motivated, then summary judgment should be denied. However, if the plaintiff was unable to provide any direct evidence of improper motive, summary judgment must be granted for the defendants. *Id.*

The *Poe* and *Martin* cases strike an appropriate balance between the *Harlow* Court's desire to limit unsubstantial suits against public officials, and plaintiffs' opportunity to overcome an asserted qualified immunity defense.

Guidance from the Court is needed regarding the application of the proper intent inquiry in a case involving qualified immunity. A "direct evidence" standard will accommodate both *Harlow* and *Turner* and yet allow plaintiffs adequate opportunity to pursue meritorious claims.

II. The Court of Appeals has departed from well settled law by holding that an individual prison staff member can be subjected to the rigors and expense of a trial based on a claim that a particular prison policy was implemented for an "improper purpose" even where no evidence was adduced as to the role he or she played in creating or implementing the policy, or that he or she personally was motivated by the alleged improper purpose.

42 U.S.C. § 1983 by its very terms requires that individual participation must be shown to have actually caused a constitutional deprivation.[7] Individual participation is a fundamental element, and the burden of proving it must be borne by the plaintiff. S. Nahmod, *Civil Rights and Civil*

---

[7] The words of the statute are familiar: "*Every person who* * * * *subjects or causes to be subjected*, any citizen * * * to the deprivation of any rights, privileges, or immunities * * * shall be liable to the party injured * * *" 42 U.S.C. § 1983 (emphasis added).

Liberties Litigation, the Law of Section 1983, 121-123 (2d Ed. 1986.)[8]

In responding to defendants' summary judgment motion in the District Court, Tribble made no showing as to the role any of the named defendants in developing or implementing the policy. Further, there was absolutely no evidence even circumstantially showing that any named defendant's actions were motivated by a punitive intent. Thus, Tribble did not make a showing of an essential requirement of his claim—that is the element that the individual named defendants in fact caused the claimed violation of his constitutional rights.

Yet this Court has recently held that Fed. R. Civ. P. 56 mandates the entry of summary judgment if a claimant is unable to make a sufficient showing to establish any essential element of the claim—i.e. one upon which the claimant will bear the burden of proof at trial. *Celotex Corp. V. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, 2553 (1986), *See also Anderson v. Liberty Lobby*, ___ U.S. ___, 106 S.Ct. 2505 (1986). Summary judgment is mandated even if there may be disputes of fact regarding other elements of the claim. A complete failure of proof regarding an essential element of the nonmoving parties' case necessarily renders all other facts immaterial—thus, there can be no genuine issue as to any material fact. *Id.*

The *Celotex* opinion emphasized that there was "no express or implied requirement in Rule 56 that the moving party support its motion with affidavit or other similar materials *negating* the opponent's claim". *Celotex*, ___ U.S. ___, 106 S.Ct. at 2553 (emphasis added). Therefore, the moving party does not have the burden of disproving any essential element. It is the claimant who must demonstrate that there is sufficient evidence on each essential element in order to warrant sending it to the jury.

In contrast, below, the Court of Appeals indicated that a defendant is entitled to summary judgment only "* * * if he makes a showing by affidavit or otherwise that he did not commit those acts * * *". Appendix A, p. 13. Thus, the decision below puts the burden on each defendant to show what

[8] *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988), contains an analysis of § 1983 causation requirements, particularly as to each individual defendant. *Leer* at 632-634.

role—if any—he or she played in creating or carrying out the policy *and* that his or her actions were not motivated by the claimed improper purpose. This is so despite the fact that Tribble has not shown any evidence that any particular defendant created or carried out the policy, or acted with the purported improper purpose.

While forcing the defendants in this case to go to trial absent evidence that they personally participated in a violation of constitutional rights, the Court of Appeals not only has departed from well-established law in this Court, it also conflicted with a decision in the Tenth Circuit.

In *Pueblo Neighborhood Health Centers v. Losavio*, 847 F.2d 642 (10th Cir. 1988), the plaintiffs filed suit in a case arising out of the seizure, inspection, copying, and retention of medical records by government officials from private health centers alleging, inter alia, that defendants were motivated by a racial animus. The defendants sought summary judgment in each case on qualified immunity grounds.

In its discussion of the plaintiff's first amendment claim based on an alleged improper purpose, the *Pueblo* court found that the plaintiffs must prove that the defendant operated with improper motive by producing some *specific factual support* for the claim of unconstitutional motive. *Id.* at 648-649.[9]

The *Pueblo* court found that a plaintiff may avoid summary judgment only if he can point to "* * * specific evidence that the official's actions were improperly motivated." *Id.* at 649. Thus *Pueblo* stands for the proposition that plaintiff must show actions *by the defendant* which demonstrate improper motivation.

Pueblo illustrates the proper individualized causation analysis required in a § 1983 case, when underlying intent is a key element in the plaintiff's claim. This requirement was clearly jettisoned in the instant case by both the District Court in denying summary judgment and the court below in affirming that denial. Each erred in allowing the issue of the policy's purpose to go to trial and in subjecting the named

---

[9] The *Pueblo* court reiterated the *Celotex* teaching that the moving party has no burden to disprove unsupported claims of his opponent. *Pueblo*, 847 F.2d at 649.

defendant to the risk of a damage award, without any evidence connecting those defendants to the allegedly improper purpose.

If an inmate plaintiff is allowed to force a prison official to the rigors of discovery and trial without having even any evidence that the individual official in fact acted to deprive him of a constitutional right through an improper purpose or motive, the requirements of *Celotex* and *Liberty Lobby*, will be evaded.

The result of the Court of Appeals' decision is to place prison officials at all levels in an impossible quandry. Policy makers who in good faith develop a facially constitutional policy risk liability if the unauthorized act of one subordinate circumstantially taints the policy with an improper purpose. Line staff, on the other hand, who merely follow the directives of their superiors, face liability for failing to discern that beneath those directives lurks an improper purpose.

This Court should avoid this unworkable result by reversing the Court of Appeals and holding that §1983 liability, if based on an improper purpose underlying a prison policy, only attaches to those who were in fact motivated by such a purpose in creating or carrying out the policy.

CONCLUSION

For all of the aforegoing reasons, the Writ of Certiorari should be granted.

DATED this 18th day of January, 1989.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record

GLENN L. HARVEY
Assistant Attorney General
7th Floor, Highways-Licenses Building
Mail Stop: FZ-11
Olympia, WA 98504
(206) 586-1445

APPENDIX A

NO. 87-3982

LANFORD D. TRIBBLE,

Plaintiff-Appellee,

v.

BOOTH GARDNER; AMOS AEED; ROBERT TRIMBLE, et al.; W. L. KAUTZKY; JAMES C. SPALDING; LAWRENCE KINCHELOE; SNELL, SGT.; J. KING; J. CHRISTY; P. EDWARDS; R. JONES; R. HANSEN,

Defendants-Appellants.

No. 87-3982.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 8, 1988.

Decided Oct. 25, 1988.

Inmate brought § 1983 action against governor and state prison officials to recover damages and to obtain declaratory and injunctive relief based upon digital rectal searches routinely conducted whenever inmate is moved into secure housing unit within maximum security prison. The United States District Court, Eastern District of Washington, Justin L. Quackenbush, J., denied motion for summary judgment based on qualified immunity defense and appeal was taken. The Court of Appeals, Cynthia Halcombe Hall, Circuit Judge, held that: (1) if searches were conducted for purposes unrelated to security considerations, searches would violate the Fourth Amendment and might violate the Eighth Amendment; (2) reasonable individual would have known that searches conducted for punitive purposes would violate inmate's clearly established rights; (3) genuine issues of material fact, as to whether searches were reasonably related to legitimate penological goal and as to whether officials reasonably could have believed that searches were conducted for legitimate penological goal, precluded summary judgment; and (4) inmate was not entitled to attorney's fees.

Affirmed.

1. Federal Courts

Court of Appeals reviews de novo denial of qualified immunity defense in § 1983 action. 42 U.S.C.A. § 1983.

2. Federal Courts

In reviewing denial of qualified immunity defense in § 1983 action, Court of Appeals reviews evidence in light most favorable to nonmoving party. 42 U.S.C.A. § 1983.

3. Civil Rights

Government officials are charged with knowledge of constitutional developments, including all available decisional law, for purposes of determining whether officials are entitled to qualified immunity from § 1983 liability. 42 U.S.C.A. § 1983.

4. Prisons

To avoid constitutional infirmity, prison regulation that infringes on inmates' constitutional rights must be reasonably related to legitimate penological objectives.

5. Civil Rights

Rule, which provides that prison regulation infringing on inmates' constitutional rights must be reasonably related to legitimate penological need, was clearly established law, for purposes of qualified immunity defense to § 1983 liability, at time inmate was subjected to digital rectal search. 42 U.S.C.A. § 1983.

6. Criminal Law
Prisons

Digital rectal search conducted on inmates for purposes unrelated to security considerations would violate the Fourth Amendment and might also constitute "cruel and unusual punishment" under the Eighth Amendment as unnecessary and wanton infliction of pain. U.S.C.A. Const. Amends. 4, 8.

See publication Words and Phrases for other judicial constructions and definitions.

7. Civil Rights

Generally, official's state of mind is not factor in determining application of qualified immunity in § 1983 action; however, when governing precedent identifies official's intent as essential element of constitutional claim in the action,

plaintiff must be afforded opportunity to overcome asserted immunity with offer of proof of official's alleged unconstitutional purpose. 42 U.S.C.A. § 1983.

8. Federal Civil Procedure

Genuine issues of material fact, concerning whether digital rectal searches performed on inmates were reasonably related to legitimate penological goal and concerning whether governor and state prison officials reasonably could have believed that searches were conducted to further legitimate purpose, precluded summary judgment on qualified immunity defense in § 1983 action arising out of policy requiring digital rectal search whenever inmate is moved into secure housing unit within maximum security prison. 42 U.S.C.A. § 1983.

9. Federal Civil Procedure

Any named defendant who shows that he did not play role in creating digital rectal search policy or that he did not participate in search upon inmate would be entitled to summary judgment, in inmate's § 1983 action based on policy requiring digital rectal search whenever inmate is moved into secure housing unit within maximum security state prison. 42 U.S.C.A. § 1983.

10. Civil Rights

In some circumstances, person may be "prevailing party," for purposes of determining entitlement to attorney fees in civil rights action, without having obtained favorable final judgment on the merits; however, person is not entitled to attorney fees unless he has established entitlement to some relief on the merits of his claims. 42 U.S.C.A. §§ 1983, 1988.

See publication Words and Phrases for other judicial constructions and definitions.

11. Civil Rights

Inmate, who presented sufficient evidence to withstand summary judgment motion based on qualified immunity defense, was not "prevailing party" entitled to attorney fees, in § 1983 action arising out of policy requiring digital rectal search whenever inmate is moved to secure housing unit

within maximum security state prison. 42 U.S.C.A. §§ 1983, 1988.

Glenn L. Harvey, Asst. Atty. Gen., Corrections Div., Olympia, Wash., for defendants-appellants.

Leo J. Driscoll, Winston & Cashatt, Spokane, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of Washington.

Before BEEZER, HALL and WIGGINS, Circuit Judges.

CYNTHIA HOLCOMB HALL, Circuit Judge:

The Governor of Washington and state prison authorities, defendants-appellants, appeal the district court's denial of their motion for summary judgment based on the defense of qualified immunity. Plaintiff-appellee Lanford D. Tribble, an inmate at the Washington State Penitentiary in Walla Walla, Washington, brought this action under 42 U.S.C. § 1983 seeking damages, declaratory and injunctive relief based upon the digital body cavity searches routinely conducted whenever a prisoner is moved into the Intensive Management Unit, a secure housing unit within the maximum security prison. We affirm.

I

In June 1984, the Washington State Penitentiary in Walla Walla opened an Intensive Management Unit ("IMU"), a ninety-six cell secure housing unit within the maximum security prison.[1] Washington State Department of Corrections Policy Directive 420.110(A)(4)(a) provides that a digital body cavity search, including the rectum, shall be conducted on all inmates prior to initial placement in the IMU, and upon return to the IMU from other portions of the prison "when a good opportunity for concealment has occurred." In other words, when an inmate has left the direct

---

[1] Assignment to the IMU occurs when "in the judgment of the superintendent, the presence of such inmate in the general inmate population would constitute a serious threat." * * *" Wash. Admin. Code § 137-32-005 (1986).

supervision and custody of escorting officers, a digital rectal search is required to be conducted on the inmate upon re-entry into the IMU. The ostensible purpose of the policy is based on the need for security in the IMU.

On January 16, 1986, prison officials discovered contraband during a search of the general population three-man cell in which Tribble resided. Tribble, on the basis of "cell tag" regulation, Wash. Admin. Code § 137-28-031 (1986),[2] was cited for possession of the contraband. The following day, a prison officer told Tribble he was to be transferred to the IMU. The officer allegedly smiled and stated: "Today, you meet 'Mr. Big Finger,' Tribble. * * *"

Prior to his move from the general population to the IMU, Tribble was handcuffed behind his back, placed in leg irons, chained around his waist, and taken to the prison hospital.[3] He was placed on an examination table and a physician's assistant conducted a digital body cavity search including digital penetration and examination of his rectum. This examination was video-taped by correctional officers. It is undisputed that the search occurred pursuant to policy, and was not based upon a suspicion that Tribble had secreted any item in his rectum. Tribble was then taken to the IMU.

Tribble brought suit alleging, in part, that the policy of conducting digital body cavity searches upon entry to the IMU from other portions of the prison without any individualized cause to do so constitutes an unreasonable search under the fourth amendment and cruel and unusual punishment under the eighth amendment. Appellants moved for summary judgment, in part, based upon the qualified immunity defense, contending that the constitutionality of the policy was an open question.

II

We have jurisdiction over this interlocutory appeal pur-

---

[2] The "cell tag" regulation provides that each cellmate is responsible "for an infraction that occurs within the confines of such cell unless he/she can establish a lack of involvement in the infraction." The propriety of such a rule presently is not before us.

[3] All inmates who are subject to a digital rectal search are similarly bound prior to the search.

suant to *Mitchell v. Forsyth*, 472 U.S. 511, 529-30, 105 S.Ct. 2806, 2817-18, 86 L.Ed.2d 411 (1985) ("[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."). *See generally Kraus v. County of Pierce*, 793 F.2d 1105, 1107-08 (9th Cir. 1986), *cert. denied*, 480 U.S. 932, 107 S.Ct. 1571, 94 L.Ed.2d 763 (1987).

[**1,2**] We review *de novo* the denial of a qualified immunity defense. *White by White v. Pierce County*, 797 F.2d 812, 814 (9th Cir. 1986). We review the evidence in the light most favorable to the nonmoving party. *Id.*

III

In this appeal, we do not determine whether the search conducted on Tribble violated the fourth amendment's proscription against unreasonable searches. Nor do we determine whether the particular search amounted to "unnecessary and wanton infliction of pain" forbidden by the eighth amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (joint opinion)); *see McRorie v. Shimoda*, 795 F.2d 780, 784 (9th Cir. 1986).[4] Instead, first we must determine whether, at the time of the search, Tribble had a clearly established right to be free from a digital rectal search conducted for purposes unrelated to security concerns. *See Davis v. Scherer*, 468 U.S. 183, 191, 104 S.Ct. 3012, 3017, 82 L.Ed.2d 139 (1984). Second, we must determine whether, given the facts of this case, a reasonable person would have known that searches pursuant to Policy Directive 420.110(A)(4)(a) violated Tribble's clearly established rights. *See Anderson v. Creighton*, ___ U.S. ___, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987).

---

[4] While the constitutionality of such searches, if based on legitimate penological objectives, may be an open question, we are faced with a different question in this appeal. Here, we must consider the searches in light of Tribble's evidence that they are conducted for reasons other than legitimate penological goals.

"[G]overnment officials performing discretionary functions[] generally are shielded from liability for civil damages [in a section 1983 action] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). The "clearly established law" test requires more than an alleged "violation of extremely abstract rights." *Anderson*, 107 S.Ct. at 3038-39. Rather, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 3038. In other words, "in the light of preexisting law the unlawfulness must be apparent." *Id.*

[3] To determine whether a right is clearly established, "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits and district courts. * * *" *Ward v. County of San Diego*, 791 F.2d 1329, 1332 (9th Cir. 1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987). An additional factor that may be considered is "a determination of the likelihood that the Supreme Court or this circuit would have reached the same result as courts which have previously considered the issue." *Capoeman v. Reed*, 754 F.2d 1512, 1515 (9th Cir. 1985). Government officials are charged with knowledge of constitutional developments, including all available decisional law. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1048 (9th Cir. 1988).

[4] We begin with the well-settled principle that "a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.' " *Turner v. Safley*, ___ U.S. ___, 107 S.Ct. 2254, 2265, 96 L.Ed.2d 64 (1987) (quoting *Pell v. Procunier*, 417 U.S. 817, 822, 94 S.Ct. 2800, 2804, 41 L.Ed.2d 495 (1974)) (brackets in original). Supreme Court decisions express the general principle in this area. *Procunier v. Martinez*, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974), *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977), and *Bell v. Wolfish*, 441 U.S. 520, 99

S.Ct. 1861, 60 L.Ed.2d 447 (1979), established the principle that, to avoid constitutional infirmity, a prison regulation that infringes on inmates' constitutional rights must be reasonably related to legitimate penological objectives. *See Turner*, 107 S.Ct. at 2257-62 (discussing cases).

Accordingly, because digital rectal searches are highly intrusive and humiliating, the Second and Fifth Circuits have stated that the government must show that a legitimate penological need necessitated the search. *United States v. Lilly*, 576 F.2d 1240, 1246 (5th Cir. 1978); *Sostre v. Preiser*, 519 F.2d 763, 764 (2nd Cir. 1975) (dicta).[5]

In *Lilly*, defendants attempted to smuggle contraband into prison and were subjected to a digital rectal cavity search. Acknowledging that "[t]he history and purpose underlying the fourth amendment * * * require that prisoners retain at least some degree of their fourth amendment protection," 576 F.2d at 1244, the court opined that "[i]t is now settled law * * * that a prisoner loses only those rights that must be sacrificed to serve legitimate penological needs." *Id.* (citing *United States v. Savage*, 482 F.2d 1371, 1372 (9th Cir. 1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1446, 39 L.Ed.2d 491 (1974)).

[**5,6**] In view of these decisions, were this court to face the constitutionality of the precise type of search conducted in this case, we would have reached the same result as the

---

[5] Cases that have upheld the constitutionality of digital rectal search policies are distinguishable in view of the nature of the security risk involved and the evidence presented here that the digital rectal searches are conducted for purposes unrelated to security concerns. In *Daughtery v. Harris*, 476 F.2d 292 (10th Cir.), *cert. denied*, 414 U.S. 872, 94 S.Ct. 113, 38 L.Ed.2d 91 (1973), the court upheld a policy requiring a digital rectal examination prior to transferring an inmate out of the prison to the custody of U.S. Marshals. In *Bruscino v. Carlson*, 654 F.Supp. 609, 620 (S.D.Ill.1987), decided after the search at issue in this case, the district court upheld a policy requiring a rectal examination upon "Control Unit" inmates each time the prisoner re-entered the Control Unit "following contact with the public." *Id.* at 619. Further, the policy examined in *Bruscino* provided that "[i]nmates may request that an x-ray be taken in lieu of the digital search." *Id.* In *Jeffries v. Reed*, 631 F.Supp. 1212 (E.D. Wash. 1986), also decided after the search at issue here, the district court upheld a policy requiring a digital rectal search of Death Row inmates who are to be permanently housed in the IMU because such prisoners "present particular and heightened security risks." Id. at 1214.

Second and Fifth Circuits. *See United States v. Savage*, 482 F.2d 1371 1373 (9th Cir. 1973) (warrantless search of prisoner's cell violates the fouth amendment unless it serves a justifiable purpose of imprisonment or prison security), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1446, 39 L.Ed.2d 491 (1974). *Accord United States v. Vallez*, 653 F.2d 403, 406 (9th Cir. 1981), *cert. denied*, 454 U.S. 904, 102 S.Ct. 412, 70 L.Ed.2d 223 (1982); *United States v. Hearst*, 563 F.2d 1331, 1344-45 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978); *United States v. Dawson*, 516 F.2d 796, 806 (9th Cir.), *cert. denied*, 423 U.S. 855, 96 S.Ct. 104, 46 L.Ed.2d 80 (1975). Therefore, we hold that this rule, that the regulation must be reasonably related to a legitimate penological need, was clearly established law at the time Tribble was subjected to the digital rectal search.[6]

The district court found that Tribble produced substantial probative evidence that the searches are conducted for purposes unrelated to security considerations.[7] We agree. In addition, viewing the evidence in the light most favorable to Tribble, there is sufficient evidence that a reasonable person would have known that such searches violated Tribble's clearly established rights.

First, digital rectal searches are one of the most intrusive methods of detecting contraband; yet, Tribble has pre-

---

[6] This rule applies to both fourth and eighth amendment claims. If the search were conducted for purposes unrelated to security considerations, not only would it violate the fourth amendment, *Lilly*, 576 F.2d at 1244, but also it may constitute cruel and unusual punishment under the eighth amendment. After incarceration, the eighth amendment prohibits the " 'unnecessary and wonton infliction of pain.' " *Estelle*, 429 U.S. at 104, 97 S.Ct. at 291 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (joint opinion)). As noted above, when a prison regulation burdens fundamental rights, the government must show that the regulation is reasonably related to a legitimate penological goal. In the absence of such a showing, an intent to punish may be inferred, *Bell v. Wolfish*, 441 U.S. at 539 & n. 20, 99 S.Ct. at 1874 & n. 20; consequently, to the extent that the digital rectal search inflicts pain, the eighth amendment's requirement of wantonness may be shown.

[7] Subsequent to the filing of this lawsuit, the Washington State Penitentiary has withdrawn its policy of conducting a digital rectal search upon entry to the IMU. The prison now conducts such searches only upon a reasonable suspicion that the inmate has secreted contraband in his rectum.

sented evidence that the prison staff do not search clothing, hair, hands or any body cavity other than the rectal cavity. Of all the evidence Tribble submitted, this evidence is most telling of the actual purpose of the digital rectal search policy.

Allen Breed, a penologist who testi..ed in related proceedings in the Eastern District of Washington and whose report was submitted to the district court in this case, reviewed "a number of videotapes of forced digital searches" and found that in those cases

> no effort was made to search the clothing, other body cavities, hair, or even hands. The entire focus and effort of the exercise was the finger probe, after which the inmates' clothing was pulled up and he was carried to a van and transported to IMU. The inmates viewed were placed in their cells at IMU with the same clothing on that they were wearing when the forced move was started!

In addition, Tribble submitted an affidavit from an inmate who stated that, despite carrying a full pack of tobacco in the pocket of his overalls,[8] he was not subjected to any method of search other than a digital rectal cavity probe upon his entry to the IMU. One can draw an inference that a search limited to the rectal cavity may be done for punitive purposes because prisoners can smuggle contraband into the IMU by concealing it elsewhere.

Second, Tribble presented evidence that the prison guards use the digital rectal search policy as a threat to influence inmates in the general population to conform to prison regulations.

Finally, Tribble contends that, because the prison staff conducted an unnecessary digital rectal search upon his return from the prison hospital in April 1986, the policy must be based upon a punitive purpose. At the hospital, Tribble had x-rays which indicated that he had no contraband concealed in his rectum. Tribble claims that the prison staff was aware of his x-ray results yet conducted the search because of a prison policy purportedly based on a need to detect such items.

Defendants contend only that Tribble's assertions tend-

---

[8] Tobacco is considered contraband within the confines of the IMU.

ing to show a purpose unrelated to security considerations were improperly relied upon by the district court in denying their motion. In particular, defendants claim that the district court erred as a matter of law by inquiring into their motivation for the implementation and execution of the digital rectal search policy.

[7] Generally, an official's state of mind is not a factor in determining the application of qualified immunity. *Anderson*, 107 S.Ct. at 3040; *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737. This rule is based upon the substantial costs of subjecting government officials to the risks of trial. Judicial inquiry into subjective motivation "may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government." *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737-38.

We recently opined, however, that in one class of cases an inquiry into defendants' motive is permissible. In *Gutierrez v. Municipal Court*, 838 F.2d 1031 (9th Cir. 1988), plaintiff challenged as unconstitutional an English-only rule enacted by a judicial district of the Los Angeles Municipal Court. Plaintiff claimed, in part, that the rule constituted racial and national origin discrimination in violation of the equal protection clause of the fourteenth amendment. Such a claim required the plaintiff to prove intentional discrimination. The defendants in that case moved for summary judgment on the basis of qualified immunity. We held that " '[w]hen the governing precedent identifies the defendant's intent (unrelated to knowledge of the law) as an essential element of plaintiff's constitutional claim, the plaintiff must be afforded an opportunity to overcome an asserted immunity with an offer of proof of the defendant's alleged unconstitutional purpose.' " *Id.* at 1050 (quoting *Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1433, *vacated in part*, 817 F.2d 144 (section IV of opinion and dissenting opinion), *reh'g denied*, 824 F.2d 1240 (section IV of opinion, dissenting opinion and judgment reinstated) (D.C.Cir.1987)).

Defendants rely on the District of Columbia Circuit's decision in *Martin* for the principle that, in cases where the court does inquire into the defendants' motivation, "some

direct evidence that the officials' actions were improperly motivated must be produced if the case is to proceed to trial." 812 F.2d at 1435. "Where the defendant's subjective intent is an essential component of plaintiff's claim, * * * then plaintiff, to avert dismissal short of trial, must come forward with something more than inferential or circumstantial support for his allegation of unconstitutional motive." *Id.*

While we are mindful of our responsibility not to reimpose the burden upon government officials *Harlow* sought to prevent, we are presented with a different type of case than *Martin.* In *Martin,* the plaintiff charged officers of the United States Capitol Police, in part, with violations of the fifth amendment. As part of his constitutional claims, the plaintiff needed to establish that the officers acted with an unconstitutional motive. *Id.* at 1431. Here, in contrast, we are not concerned with the defendants' subjective malice in conducting the particular search upon Tribble; rather, Tribble asks us to examine the purpose of the policy requiring such searches. *See* Note, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,* 95 Yale L.J. 126 (1985). In cases where the purpose of a prison regulation is at issue, there is no "direct evidence" equivalent to legislative history that plaintiffs may examine. To hold plaintiffs in such cases to a "direct evidence" standard would effectively insulate arbitrary governmental action from judicial scrutiny.

Moreover, as noted above, this suit is not an insubstantial one; Tribble's evidence is probative and significant. In contrast, in attempting to support the policy below, defendants relied solely on the presumed inherent propensity of IMU inmates to violate prison regulations. In view of Tribble's evidence of how the digital rectal search policy is executed, the policy does not reflect this justification.

[8] Accordingly, we agree with the district court that Tribble has produced sufficient evidence to show that the searches are conducted for punitive purposes unrelated to security concerns and that a reasonable person would have known that searches based on such motives violated Tribble's

clearly established rights.[9] Therefore, we hold that, viewing the facts in the light most favorable to the plaintiff, the district court was correct in denying defendants' motion for summary judgment on the basis of qualified immunity. *Cf. Allen v. Scribner*, 812 F.2d 426, 436 (when motivation of defendants is relevant to application of qualified immunity and is in dispute, jury must decide issue), *amended*, 828 F.2d 1445 (9th Cir.1987).

IV

[9] Defendants also assert that Tribble has failed to produce sufficient evidence linking any named defendant either to the particular search of him or to the creation of the digital rectal search policy. The difficulty, as defendants view it, is that Tribble has not adequately alleged that any of the named defendants harbored an unconstitutional motive. Tribble's suit, however, is not based upon the particular subjective intent of the defendants; rather, it is based upon the purpose of the policy.

Nevertheless, a defendant "is entitled to summary judgment if he makes a showing by affidavit or otherwise that he did not commit those acts and 'discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.' " *Kraus v. County of Pierce*, 793 F.2d 1105, 1108 (9th Cir.1986) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815, 86 L.Ed. 2d 411 (1985)). Thus, to the extent that a named defendant shows that he did not play a role in creating the digital body cavity search policy or that he did not participate in the search upon Tribble, he is entitled to summary judgment. Here, however, no named defendant has attempted to make such a showing.[10]

---

[9] In view of the substantial evidence that, in enacting Policy Directive 420.110(A)(4)(a), defendants have exaggerated their response to purported security considerations, we do not defer to their expert judgment in these matters. *See, e.g., Whitley v. Albers*, 475 U.S. 312, 322, 106 S.Ct. 1078, 1086, 89 L.Ed.2d 251 (1986) (deference accorded to prison administrators "does not insulate from review actions taken * * * for no legitimate purpose"); *Pell v. Procunier*, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495 (1974) ("Courts cannot * * * abdicate their constitutional responsibility to delineate and protect fundamental liberties.").

[10] Of course, a named defendant may make such a showing at trial.

V

[**10**] Tribble argues that he is entitled to attorney's fees. 42 U.S.C. § 1988 authorizes a court to award attorney's fees to the prevailing party under any of several civil rights statutes, including 42 U.S.C. § 1983. In some circumstances, a person may be a prevailing party without having obtained a favorable final judgment on the merits. *Hanrahan v. Hampton*, 446 U.S. 754, 756-57, 100 S.Ct. 1987, 1988-89, 64 L.Ed.2d 670 (1980) (per curiam). However, Congress intended to permit an award of attorney's fees "only to a party who has established entitlement to some relief on the merits of his claims. * * *" *Id.* at 757, 100 S.Ct. at 1989. In *Hanrahan*, the Supreme Court held that the respondents were not prevailing parties merely because the court of appeals had found they were entitled to a trial. *Id.* at 758, 100 S.Ct. at 1989.

[**11**] Although we affirm the district court's decision to deny summary judgment on qualified immunity grounds, Tribble has not yet succeeded on the merits of his claim. Contrary to Tribble's contention, our decision does not confirm that defendants are not immune from liability. Rather, our decision simply allows Tribble a trial on the merits. At trial, defendants may still be entitled to qualified immunity if the trier of fact finds that the searches are reasonably related to a legitimate penological goal, or that the defendants reasonably could have believed that the searches were conducted to further such a purpose. *See Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir.1984). Therefore, Tribble's request for attorney's fees is denied.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NO. C-86-234-JLQ

LANFORD D. TRIBBLE,

Plaintiff

v.

BOOTH GARDNER, et al.,

Defendants

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT RE: DIGITAL CAVITY SEARCH

Plaintiff, Lanford Tribble, an inmate at Washington State Penitentiary in Walla Walla, Washington, brings this action under 42 U.S.C. § 1983 of the Civil Rights Act, alleging violations of the Fourth, Eighth, and Fourteenth Amendments. Plaintiff alleges (1) the "cell tag" regulation deprives him of due process of law in that it provides that an infraction may issue without evidence of individual participation; (2) he was deprived of due process in that he was not afforded notice and an opportunity to be heard within a reasonable time after his transfer to Administrative Segregation; (3) he was deprived of due process regarding his transfer to the Intensive Management Unit; and (4) the policy of conducting digital body cavity searches upon entry to the Intensive Management Unit from other portions of the prison constitutes an unreasonable search, cruel and unusual punishment, and a "grievous loss" of liberty and privacy. This court appointed counsel to represent the indigent plaintiff and stayed the prosecution of the other prisoner actions filed in this court challenging the digital cavity search.

Tribble seeks injunctive relief and compensatory and punitive damages. He has named as defendants Booth Gardner, Governor; Amos Reed, Department of Corrections

former Secretary; Robert Trimble, Department of Corrections Deputy Secretary; W. L. Kautzky, Director of the Division of Prisons; James Spalding, Deputy Director of the Division of Prisons; Lawrence Kincheloe, Washington State Penitentiary Superintendent; R. Zabor, Washington State Penitentiary medical staff; and Correctional Officers Sergeant Snell, J. King, J. Christy, P. Edwards, R. Jones, and R. Hansen. Tribble has also named John Doe defendants who have been dismissed by the court with leave to join them upon learning their identities.

Defendants have moved for summary judgment solely on the issue of the constitutionality of the digital body cavity searches without a cause predicate, and the applicability of the qualified immunity defense. (Ct. Rec. 7 & Ct. Rec. 46A). Oral argument was heard on October 14, 1986, and on October 27, 1986, counsel requested this court stay disposition of the motion for partial summary judgment pending settlement negotiations. At this time, the parties have advised that settlement appears unlikely and the parties have filed supplemental briefs. Accordingly, the stay is removed. The motion for summary judgment will be limited to consideration of the constitutionality of digital body cavity searches without a cause predicate (excluding challenges to the *manner* of the search) and the applicability of the qualified immunity defense.

FACTS

In June, 1984, the Washington State Penitentiary opened an Intensive Management Unit (IMU), a secure housing unit within the walls of this already maximum security institution. Policy Directive 420.110 (A)(4) provides that a digital body cavity search shall be conducted on all inmates prior to placement in IMU from other portions of the prison or upon return to IMU from other portions of the prison "when a good opportunity for concealment has occurred." (Ct. Rec. 7, Affidavit of James Blodgett, App. A). Assignment to IMU occurs when "in the judgment of the superintendent, the presence of such inmate in the general inmate population would constitute a serious threat * * *". Washington Administrative Code 137-32-005.

On January 16, 1986, contraband was discovered upon a search of the general population three-man cell in which plaintiff resided. Plaintiff, on the basis of the "cell tag" regulation (each cellmate is responsible for all the contents of the cell) was infracted for possession of the contraband and was transferred to the segregation unit. The following day, January 17, 1986, plaintiff was transferred to IMU.

Prior to his being moved from general housing to IMU, plaintiff was handcuffed behind his back, which handcuffs were attached to a chain, placed in leg irons and taken to the prison hospital and placed on an examination table. A physician's assistant then conducted a digital body cavity search including digital penetration and examination of the anal canal. This examination was videotaped by correctional officers. It is undisputed that the search occurred pursuant to policy, and was not based upon an individualized cause predicate or suspicion that the plaintiff had secreted any item in his anal canal. Plaintiff was thereafter taken by van to IMU, and allegedly "stripped naked in full view of inmates and guards, and was then walked up to IMU Cell F-12, where I was left totally naked. The cell was cold and I used my mattress for warmth. The next day, January 18, 1986, at approximately 1:30 P.M., clothes were given to me." First Affidavit of Lanford Tribble, at p.4 (Ct. Rec. 25).

Plaintiff argues that the digital body cavity search without any cause predicate is an unreasonable search in violation of the Fourth Amendment, constitutes cruel and unusual punishment in violation of the Eighth Amendment, and infringes upon a liberty and privacy interest protected under the Fourteenth Amendment.

FOURTH AMENDMENT

The Fourth Amendment prohibits searches which are unreasonable. The "reasonableness" test requires:

> * * * a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559.

In the prison context, the reasonableness inquiry is limited by the Supreme Court's admonishment that, as prison officials ordinarily are better informed on security matters, prison officials must "be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell*, *supra* at 547.

Under *Bell*, the first question is whether the digital body cavity search without a cause predicate advances prison security. Defendants argue that IMU inmates, as a group, pose a threat of smuggling contraband, that is, that the nature of the inmates confined in IMU constitutes a cause predicate.

This court agrees that digital body cavity searches advance prison security, and defendants' policy is entitled to deference unless there is substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations. In this regard, plaintiff has put forth several persuasive arguments.

First, plaintiff notes that more effective but less intrusive methods of detecting contraband are not utilized. Plaintiff argues that the use of a detection method which is of *limited effect* in preventing the flow of contraband, but which is probably the *most intrusive* method, constitutes an exaggerated response. Plaintiff supports his argument by affidavits of expert witnesses Herbert P. Mean, M.D. (as to intrusiveness of the search) (Ct. Rec. 27 and 34) and Allen Breed (as to limited effect) (Ct. Rec. 32). Plaintiff explains that although the current technique utilized by inmates for concealing contraband is to swallow the contraband, the method for detecting ingested contraband, the "dry cell", is not utilized (Ct. Rec. No. 32). Further, plaintiff argues that no effort is made by the prison staff to search clothing, body cavities other than the rectal cavity, hair, or even hands. Certification of Allen Breed, p.33 (Ct. Rec. 32), and Affidavit of Charles E. Long (Ct. Rec. 28).

Second, plaintiff contends the security risk in IMU is lower than that present in the general prison, due to the construction of IMU and the security precautions utilized once

an inmate is confined in IMU. IMU is composed of single occupant units with solid doors except for a vent, a small tray door, and a solid window. IMU inmates are never allowed to be in the same room with another IMU inmate. Strip searches are conducted any time an inmate leaves his cell for any reason. Plaintiff argues that the risk of the use of contraband to injure prison staff or other inmates is far more limited than in the general prison population, and that "guards can totally control any ability of the prisoners to pass contraband." *See* Ct. Rec. 23, Answer 29.

Third, plaintiff contends that defendants have exaggerated their concern about the flow of contraband. This argument is based on the fact that digital body cavity searches are not conducted on inmates leaving the general population prison premises prior to transfer (*Daugherty v. Harris*, 476 F.2d 292 (10th Cir. 1973)) *cert. denied*, 414 U.S. 872, or even where there is the probability of access to contraband, *e.g.*, upon entry to prison following presence in an unrestricted environment. *See, e.g., United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978) *reh'g denied* 599 F.2d 619; *People v. Valenzuela*, 589 P.2d 71 (41 Colo. App. 375 (1978); and *People v. Woods*, 293 P.2d 901 139 (Call. App.2d 515 (1956), *cert. denied*, 352 U.S. 1006. Plaintiff argues that although the courts have found searches with reasonable suspicion to be reasonable in that the risk of concealing contraband was clear, the defendants in this case, in the face of such clear risk, do not conduct body cavity searches under these circumstances. Only prisoners entering or re-entering IMU are subjected to a digital body cavity search in the absence of individualized reasonable suspicion. (Ct. Rec. 23, Answers 3, 11, 12).

Fourth, plaintiff apparently contends that a policy which endangers other legitimate penal concerns constitutes an exaggerated response. Plaintiff argues that the IMU search policy seriously impairs the penalogical concerns of minimizing incidents of violence and modifying prisoner behavior. In support of his argument, plaintiff has submitted the affidavits of Kenneth Schoen, Director of the Justice Program of the Edna McConnell Clark Foundation (Ct. Rec. 26), Dr. Herbert Beam, and the Certification of Allen F. Breed's report prepared by Mr. Breed as an independent expert in

the *Hoptowit v. Ray* proceedings. *Hoptowit v. Ray*, No. C-79-359-RJM, United States District Court, Eastern District of Washington.

Kenneth Schoen states that the reaction of inmates to a forced rectal cavity search "can be so severe that the procedure itself is a serious threat to the security of the institution." (Ct. Rec. 26, p.3). Dr. Herbert Beam advises that "[f]rom a prisoner's point of view, an involuntary body cavity search constitutes rape. Failure to recognize this and continuation of these practices will seriously jeopardize attempts to restore the prisoners to productive states." (Ct. Rec. 27, p.4, and Ct. Rec. 34).

Allen Breed made two findings in this regard: "*With the exception of IMU*, the inmates assigned to WSP demonstrated little or no fear or tension related to their housing, programming, or security" (emphasis added); "[C]urrent practices which include * * * the routine use of anal probe searches have created a climate in some sections of the prison of hostility, humiliation, degradation and vengefulness. The result of this climate has been an unusually large number of 'uses of force' by staff, and has resulted in unnecessary violence by those involved in such practices." (Ct. Rec. 32, p.33, Findings of Fact No. 6 and 10). Mr. Breed explains that "[i]nmates in most cases refuse such search unless force is to be used. To maintain their own concept of manliness, and to withstand the pressure of their peers, a stand of opposition must be taken to prove that they did not submit voluntarily." (Ct. Rec. 32, p.32).

Fifth, plaintiff contends the digital body cavity search policy has a chilling effect on an inmate's exercise of the right to obtain medical treatment which would entail departure and re-entry to IMU. (Ct. Rec. 22, Exh. 3(e)).

Sixth, plaintiff argues that less-intrusive alternative methods of detecting contraband are not utilized.

This court finds there is substantial evidence in the record to indicate that the officials have exaggerated their response to their security considerations. Accordingly, defendants are not entitled to deference in the adoption of the IMU search policy and the court must resort to the Fourth Amendment "reasonableness" test as set out above. The bur-

den of proving the reasonableness of the search is, therefore, upon the defendants, and the more intrusive the search, the heavier the defendants' burden of proving the reasonableness of that search. *United States v. Afanador*, 567 F.2d 1325, 1328 (5th Cir. 1978).

Given the highly intrusive nature of the search, the defendants' reliance solely on the presumed inherent propensity of the IMU inmates to violate prison regulations is insufficient under the Fourth Amendment balancing principles. Further, the evidence is insufficient to sustain defendants' conclusion that IMU inmates comprise only inmates who have demonstrated "assaultive behavior against staff or other inmates or those inmates who are assigned to administrative segregation for extended periods of time." (Affidavit of James Blodgett, p.3) (Ct. Rec. 7).

In light of plaintiff's transfer to IMU, which transfer purportedly was based upon a cell tag which requires no evidence of participation in conduct violating regulations, it is very difficult to categorize the inmate population in IMU as the "most violent and the most disruptive of inmates." (Affidavit of Amos Reed (Ct. Rec. 7)). (See also Affidavit of James Blodgett, Exh. H (Ct. Rec. 7), (initial placement reasons include refusing to lockup, refusing to stand for a search, refusing to move to assigned bunk).

Summary judgment should only be granted if the pleadings, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R. Civ.P.56(c). When considering a summary judgment motion, the court must view all inferences drawn from the underlying facts in a light most favorable to the party resisting the motion. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). Further, where the nonmoving party contends there is a disputed fact, the evidence of such disputed fact must be "significantly probative" to overcome the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2511 (1986).

Plaintiff disputes both the security concerns and the reasonableness of the method. Plaintiff has submitted evidence of these disputed facts which is "significantly proba-

tive". Therefore, summary judgment is not proper at this time.

EIGHTH AMENDMENT

Plaintiff contends the IMU search policy was implemented for the purpose of inflicting punishment and that the search caused him great pain. The Eighth Amendment, as applied to convicted inmates, applies only to the infliction of pain. *See Ingraham v. Wright,* 430 U.S. 651, 670 (1977) ("After incarceration, only the 'unnecessary and wanton infliction of pain' * * * constitutes cruel and unusual punishment forbidden by the Eighth Amendment.")

In regard to the infliction of pain in the course of a prison security measure, the Supreme Court has held that the infliction of pain

> does not amount to cruel and unusual punishment simply because it may appear in retrospect that the degree of force authorized or applied for security purposes was unreasonable, and hence unnecessary in the strict sense.
>
> [W]e think the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether the force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm * * *" "such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted," are relevant to that ultimate determination * * * But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response.

Whitley v. Albers, ___ U.S. ___, 106 S.Ct. 1078, 1084-85 (1986) (citations omitted).

Based upon the standard set forth in *Whitley,* the Ninth Circuit has held that a prison official/guard violates an inmate's Eighth Amendment right when the official's conduct constitutes "a use of force that the [official] could not plausibly have thought necessary and [the conduct] evinces a wanton disregard for the unjustified infliction of harm." *McRorie v. Shimoda,* 795 F.2d 780, 784 (9th Cir. 1986).

As stated infra, there is substantial evidence in the record to indicate that the officials have exaggerated their response to security considerations. Accordingly, defendants are not entitled to deference in the adoption of the IMU search policy. The necessity of the force used is unresolved by deference to the defendants and remains a disputed issue of material fact precluding summary judgment.

FOURTEENTH AMENDMENT

Plaintiff contends that the search constitutes a "grievous loss" of liberty with a concommitant right to due process. Defendant opposes this cause of action solely on the basis that the Fourteenth Amendment cannot be a separate basis for relief where the cause of action is based on a specifically protected interest.

Defendant bases his argument on the Supreme Court's decision in *Whitley v. Albers*, ___ U.S. ___, 106 S.Ct. 1078 (1986), wherein the court held that where a cause of action based on excessive force is asserted, the substantive due process protections of the Fourteenth Amendment provided no greater protection than the Eighth Amendment "which is specifically concerned with the unnecessary and wanton infliction of pain in penal institutions, [and which] serves as the primary source of substantive protection * * *". *Whitley, supra* at 1088. However, plaintiff's Fourteenth Amendment cause of action is founded upon the "grievous loss" test, which loss requires *procedural* due process. *Vitek v. Jones*, 445 U.S. 480, 491-93 (1979). Thus, plaintiff's cause of action based on a failure to accord procedural due process is not foreclosed by his Eighth Amendment claim.

As the moving party has produced no evidence in support of a motion for summary judgment on the cause of action based on the Fourteenth Amendment, summary judgment is not proper as to this cause of action.

QUALIFIED IMMUNITY

Defendants contend that, even if the digital body cavity search without a cause predicate violated Mr. Tribble's constitutional rights, the defendants are entitled to immunity from liability for damages pursuant to the "qualified immu-

nity" defense. Government officials performing discretionary functions are shielded from liability for civil damages "if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

In determining whether a right is clearly established, "in the absence of binding precedent, a court should look at all available decisional law including decisions of state courts, other circuits, and district courts * * *. An additional factor is the likelihood that the Supreme Court or the Ninth Circuit would have reached the same result as courts that have already considered the issue." *Ward v. County of San Diego,* 791 F.2d 1329, 1332 (9th Cir. 1986), *citing Capeoman v. Reed,* 754 F.2d 1512, 1514-15 (9th Cir. 1985).

Defendants contend the issue is whether the searches, if related to security considerations, are constitutionally permissible. Plaintiffs contend the issue is whether the searches, if unrelated to security considerations, are constitutionally permissible. The two issues are distinct and require a different analysis and conclusion as to the applicability of the qualified immunity defense.

As to defendants' contention, the parties and the court agree that there is no precedent concerning digital body cavity searches without a cause predicate. However, some courts have considered the issue of digital body cavity searches based on a cause predicate, and have held that such searches are constitutionally permissible. *See, e.g., Daugherty v. Harris, supra; United States v. Lilly, supra; People v. Valenzuela, supra;* and *People v. Woods, supra.* The issue at bar is whether the nature of IMU inmates and the nature of IMU detention constitute a *sufficient* cause predicate. It is with this narrow question in mind that I consider application of the qualified immunity defense.

It has been held that certain situations constitute a sufficient cause predicate, *e.g.,* prior to court appearances (*Daugherty v. Harris, supra; State v. Hartzog,* 96 Wn.2d 383, 635 P.2d 694 (1981)), or where there is the probability of access to contraband, *e.g.,* upon entry to prison following presence in an unrestricted environment (*United States v. Lilly, supra; People v. Valenzuela, supra; People v. Woods,*

supra; Vera v. State, 400 So.2d 1008 (Fla. App. 1981). It is not clear whether certain classes of offenders constitute a cause predicate.

The Ninth Circuit has consistently held the view that, due to the "serious invasion of personal privacy and dignity," occasioned by a digital body cavity search, *Henderson v. United States,* 390 F.2d 805, 808 (9th Cir. 1967), such searches at a border must be based on "subjective suspicion supported by objective, articulable facts." *U.S. v. Handy,* 788 F2d 1419, 142 (9th Cr. 1986). The *Henderson* court held that while it was judicially noted that narcotics were frequently smuggled across the border in women's body cavities, the class composed of women crossing the Mexican border did not constitute a cause predicate justifying body cavity searches, *i.e.,* individualized suspicion was required. *Henderson, supra* at 808. It is noted that Judge McNichols of this court, in a pro se prisoner case, held that the transfer of a death row inmate into IMU constituted sufficient "cause predicate" to justify a digital body cavity search without other individualized suspicion. *Jeffries v. Reed,* 631 F.Supp. 1212, 1216 (E.D. Wash. 1986). *Jeffries* is to be distinguished from other cases in that Jeffries was to permanently reside in IMU until his death sentence was carried out or the sentence was otherwise changed. It is further noted that in this and related cases, Judge McNichols found the challenges of the digital search policy to be of sufficient merit to warrant the appointment of counsel for plaintiffs.

Certainly the law is unclear as to what class constitutes a sufficient cause predicate to justify digital body cavity searches. Accordingly, if the digital body cavity searches were conducted on the basis of the class of IMU inmates, *i.e.,* the inherent security risk involved, defendants are entitled to immunity from damages.

However, as to the issue presented by plaintiff, the law is clearly established that the search must be based upon legitimate penalogical objectives, *i.e.,* security considerations. Plaintiff contends that the searches are conducted for punitive purposes, and are unrelated to security considerations. Plaintiff has set forth probative evidence to support the alle-

gation of an impermissible purpose; the evidence constitutes neither conclusions nor mere allegations.[1]

The Supreme Court has held that an official's state of mind or intent is not a factor in determining application of qualified immunity. *Harlow, supra* at 817-818. However, the scope of the prohibition on any inquiry into an official's subjective intent does not extend to inquiry into an unconstitutional *purpose*, where such purpose constitutes the violation. In a similar case, where defendants claimed a search was related to security concerns and plaintiff argued the search was conducted for an impermissible purpose, the court held that "a rational jury might conclude that the search * * * did not serve a justifiable purpose [and, therefore,] violated clearly established law." *Nakao v. Rushen*, 545 F. Supp. 1091, 1092 (N.D. Cal. 1982), *vacated on other grounds* 766 F.2d 410 (1985). *See also, Gannon v. Daley*, 561 F. Supp. 1377 (N.D. Ill. 1983) (factual issue as to impermissible purpose precluded summary judgment on qualified immunity); *Dehorty v. New Castle County Council*, 560 F. Supp. 889 (D. Del. 1983) (factual issue as to impermissible purpose precluded summary judgment on qualified immunity).

The defendants' motion for summary judgment is DENIED. While the parties have informed the court that the defendants voluntarily terminated the IMU entry digital rectal search subsequent to the argument on defendants' motion

---

[1] Defendants have also submitted evidence which tends to support the allegation that at least placement in IMU, if not the mandatory search at time of placement, is a punitive measure. *See* Affidavit of James Blodgett, App. H; Reasons For Placement In IMU (Ct. Rec. 7):

Initial Reason for Placement in IMU: "inmate refused to lockup in his cell on 7-31-84." The record notes the inmate had filed 109 Grievances. The infraction record indicated 42 serious infractions while in IMU — but it is not clear what infractions he received prior to IMU placement.

Initial Reason for Placement in IMU: "for refusing a cell assignment in 6/85. [His] record shows a continual and consistent pattern of assaultive behavior." Again, it appears placement in IMU was based on previous behavior.

Initial Reason for Placement in IMU: "continued refusal to accept cell assignments."

Initial Reason for Placement in IMU: "refusing to move to his assigned bunk when ordered to do so and escalating infractions on 2-21-85."

for summary judgment, the court suggests that this matter next proceed, at plaintiff's option, either by way of a motion for summary judgment filed on behalf of plaintiff or by way of a preliminary or permanent injunction request.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 28th day of May, 1987.

/s/ JUSTIN L. QUACKENBUSH
United States District Judge

3/31, p 2

DISTRIBUTED MAR 22 1989 MAR 31 PAGE 2

RECEIVED
MAR 22 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

AMOS REED, et al., Petitioners, vs. LANFORD D. TRIBBLE, Respondent.	No. 88-1259 MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

The respondent Lanford D. Tribble asks leave to file the attached brief in opposition to petition for writ of certiorari, without prepayment of costs and to proceed *in forma pauperis*. Petitioner has been granted leave to so proceed in both the U.S. District Court and the Court of Appeals. Petitioner's affidavit in support of this motion is also attached hereto; also a supplemental affidavit of the undersigned counsel.

DATED this _____ day of March, 1989.

LEO J. DRISCOLL
WINSTON & CASHATT
19th Floor Seafirst Financial Ctr.
Spokane, WA 99201-0695
(509) 838-6131
Counsel for Respondent

MOTION TO PROCEED ON
APPEAL IN FORMA PAUPERIS

No. 88-1259

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

AMOS REED, et al.,

Petitioners,

V.

LANFORD D. TRIBBLE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Leo J. Driscoll
Winston & Cashatt, Lawyers
19th Floor
Seafirst Financial Center
Spokane, WA 99201
(509) 838-6131
Counsel for Respondent

QUESTIONS PRESENTED

I. Is a § 1983 defendant who would seek summary judgment based upon qualified immunity subject to the threshold burdens which are ordinarily imposed on any other moving party seeking summary judgment, including the burden of demonstrating the absence of a genuine issue of material fact, or of showing the absence of evidence to support an element of the non-movant's case?

II. On interlocutory appeal of a denial of qualified immunity, do the appellate courts have jurisdiction to review or consider the issue of the individual conduct or participation of a § 1983 defendant if such issue was never presented to or ruled upon by the District Court?

III. In the context of a claim for, and in response to qualified immunity, what evidence will suffice to demonstrate the existence of a genuine issue of material fact as to whether the ostensible or proffered justifications for a prison policy of administering a highly intrusive rectal cavity probe search to inmates are pretextual?

LIST OF PARTIES

The parties to the proceeding below were the following Petitioners, who were aligned as Defendants-Appellants below: Amos Reed, former Washington Department of Corrections Secretary; Robert Trimble, Washington Department of Corrections Deputy Secretary; W. L. Kautzky, Director of the Division od Prisons; James C. Spalding, Deputy Director of the Division of Prisons; Lawrence Kincheloe, Washington State Penitentiary Superintendent; R. Zabor, Washington State Penitentiary medical staff; and Correctional Officers Sergeant Snell, J. King, Christy, P. Edwards, P. Jones, R. Hansen. L. Menke and S. Worden were later added as parties defendant.

Respondent Lanford D. Tribble, an inmate serving a sentence at the Washington State Penitentiary at Walla Walla, was aligned as the Plaintiff-Appellee below.

TABLE OF CONTENTS

		Page
QUESTIONS PRESENTED		i
LIST OF PARTIES		ii
TABLE OF CONTENTS		iii-iv
TABLE OF AUTHORITIES		v-vi
I.	STATEMENT OF THE CASE	1-5
II.	REASONS FOR DENYING THE WRIT	5-9
	A. The Ordinary Requirements of Fed. R. Civ. P. 56(c) and (e) are Applicable to a Motion for Summary Judgment Based Upon Grounds of Qualified Immunity.	5-8
	B. The Court of Appeals did not have Jurisdiction of the Issue of the Sufficiency of Evidence as to Individual Conduct	8-9
	C. In a Maximum Security Prison Setting, and in Response to a Claim of Qualified Immunity, What Evidence Will Suffice to Demonstrate the Existence of a Genuine Issue of Material Fact as to Whether the Proffered Justifications for a Prison Policy of Administering a Highly Intrusive Rectal Cavity Probe Search to Inmates are Pretextual	9-19
	1. Respondent has Presented Direct, Significant and Probative Evidence that the Subject Search did not Serve Penological Needs	9-11
	2. Turner v. Safley does not Denigrate Circumstantial Evidence	11-13
	3. Unless Near-Absolute-Immunity is to be Accorded, Reality Necessitates the Use of Probative and Significant Evidence, Including Circumstantial Evidence	13-14

4. Cases Relied upon by Petitioners Calling for a Direct Evidence Standard are Distinguishable, Unpersuasive and do not Merit Grant of Certiorari in this Case . 14-16

5. The Focus should be on the Substantiality of the Evidence and not upon an Arbitrary Classification of Evidence 16-19

III. CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Bruscino v. Carlson,
654 F. Supp. 609 (S.D. Ill. 1987),
aff'd 854 F.2d 162 (7th Cir. 1988) 3

Celotex Corp. v. Catrett,
477 U.S. 317, 106 S. Ct. 2548,
(1986) 6, 7, 8, 9, 17

Cohen v. Beneficial Industrial Loan Corp.,
337 U.S. 541, 69 S. Ct. 1221 (1949). 9

Green v. Carlson,
826 F.2d 647 (7th Cir. 1987) 7

Halperin v. Kissinger,
807 F.2d 180 (D.C. Cir. 1986). 7

Harlow v. Fitzgerald,
457 U.S. 800, 102 S. Ct. 2727 (1982) 7, 9, 10, 11, 14

Hobson v. Wilson,
737 F.2d 1 (D.C. Cir. 1984), cert. denied
470 U.S. 1084, 105 S. Ct. 1843 (1985). . . . 13

Lowe v. City of Monrovia,
775 F.2d 998 (9th Cir. 1985) amended by
784 F.2d 1407 . . . . . 13, 17

Martin v. D.C. Metropolitan Police Dept.,
812 F.2d 1425, opinion vacated in part
817 F.2d 144, and reinstated on
reconsideration 824 F.2d 1240. . . . . 14, 15, 16, 17, 18, 19

McSurely v. McClellan,
697 F.2d 309 (D.C. Cir. 1982), cert. denied
474 U.S. 1005, 1065 S. Ct. 525 (1985). . . . 7

Mitchell v. Forsyth,
472 U.S. 511, 105 S. Ct. 2806 (1985) 9

Poe v. Haydon,
853 F.2d 418 (6th Cir. 1988), cert. denied
109 S. Ct. 788 (1989). 15, 16, 18, 19

Pueblo Neighborhood Health Centers v. Losavio,
847 F.2d 642, (10th Cir. 1988) 17, 18

Turner v. Dammon,
848 F.2d 440 (4th Cir. 1988) 17

Turner v. Safley,
482 U.S. 78, 107 S. Ct. 2254 (1987) 12

U.S. v. Henderson,
693 F.2d 1028, (11th Cir. 1982) 2, 3

Washington v. Davis,
426 U.S. 229, 96 S. Ct. at 2040 (1976). . . 8

Wright v. South Arkansas Regional Health Center, Inc.,
800 F.2d 199 (8th Cir. 1986) 16

STATUTES AND REGULATIONS

28 U.S.C. § 1291 . . . . . 8, 9

42 U.S.C. § 1983 1

Fed. R. Civ. P. 12(b)(6) 5

Fed. R. Civ. P. 56(c) and (e) 5, 7

Fed. R. Civ. P. 56 9

OTHER AUTHORITIES

Federal Jury Practice and Instructions, Devitt & Blackmore, Vol. 1, § 15.02, § 40.11. 11

Qualified Immunity for Governmental Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation," 95 Yale Law Journal 126, 135, 136 14

Black's Law Dictionary, Revised Fourth Addition. 9

BRIEF IN OPPOSITION

The respondent Lanford D. Tribble respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit's opinion, on interlocutory appeal, affirming the denial of a motion for summary judgment based on qualified immunity. The Court of Appeal's opinion is reported at 860 F.2d 321 (9th Cir. 1988) and is reprinted as Appendix "A" to the Petition for Writ of Certiorari.

I. STATEMENT OF THE CASE

Respondent Lanford D. Tribble, an inmate at the Washington State Penitentiary (WSP), initiated this action under 42 U.S.C. § 1983, seeking damages, declaratory and injunctive relief against prison officials[1] who promulgated and/or implemented a body cavity search policy and practice at WSP. Under that policy and practice, a digital probe search of an inmate's rectal cavity was routinely made in connection with the inmate's transfer to WSP's Intensive Management Unit (IMU), a highly secure housing unit ['prison within a prison'] in WSP, or

---

[1]Booth Gardner, the Governor of the State of Washington, was initially named as a defendant but by order dated March 14, 1988, was dismissed with prejudice, Ct. Rec. No. 119. Counsel for petitioners have erroneously identified Governor Gardner as a petitioner in the certiorari Petition.

if and when the inmate re-entered the IMU after being temporarily absent.

In connection with transfer to the IMU and before receiving the rectal probe enroute, routinely (and likewise true in the instant situation) the inmate is placed in leg irons, and is handcuffed behind his back, with the handcuffs attached to a chain around his waist. The rectal probe was done notwithstanding the inmate's protest; it was done as a matter of policy, irrespective of any suspicion that the particular inmate has secreted contraband in his rectal cavity. The claimed justification for the rectal search policy is that inmates who are transferred to the IMU represent a dangerous class of inmates[2] who have propensity to violate prison regulations.

Respondent was transferred to the IMU and was subjected to the rectal cavity probe enroute to the IMU because contraband was found in the three-man cell *to which he was assigned*.

Under the prison's "cell tag" policy[3] each inmate is ipso facto responsible for an infraction occurring within the

---

2 Notwithstanding petitioner's assertion to the contrary, the District Court made no ruling that "the policy is constitutional if aimed at a particularly dangerous class of inmates" (Pet. Appx. A-3). Likewise, the Court of Appeals expressly declined to make ruling as to whether the search or search policy as applied to IMU inmates violated constitutional principles (Pet. Appx. A-6). Both rulings were more narrowly confined.

3The "cell tag" policy is not presently before this Court.

cell *to which he is assigned* unless he can affirmatively establish a lack of involvement in the infraction. Before being subjected to the rectal probe enroute to the IMU, respondent Tribble was neither given notice of why he was being transferred nor opportunity to establish his lack of involvement with the contraband found in the three-man cell.[4]

At a later date, respondent was taken from the IMU to the prison hospital where a medical diagnostic x-ray was taken. The diagnostic x-ray also disclosed the absence of any contraband in his rectal cavity. Though aware of that finding, the guards required that respondent be subjected to another rectal probe before his return to the IMU because the prison rectal search policy did not recognize the efficacy of such an x-ray as an alternative to the digital probe.[5]

---

[4]During discovery phases, petitioners have contended that the search of the subject cell (and of another cell or more) was based upon confidential information of a possible murder plot. However, apart from or prior to that, respondent was never given notice of that information and has never been charged with any complicity in any such plot.

[5]In oral argument to the District Court, counsel for petitioner acknowledged that the State of Washington was the only state prison system that utilized this highly intrusive rectal probe search practice (Ct. Rec. 43, pp. 14 and 15). Shortly thereafter, the State of Washington discontinued the policy and practice and substantially narrowed the circumstances under which a rectal probe may be used. The Federal Prison at Marion, Illinois, also allows use of the rectal search in more limited conditions and affords the inmate the opportunity to use an x-ray in lieu of the rectal search. Bruscino v. Carlson, 654 F. Supp. 609, 619 (S.D. Ill. 1987).

In response to respondent inmate's *pro se* handwritten complaint, petitioner officials moved for summary judgment, asserting that the digital rectal probe search policy and practice was justified by the needs of prison security, was not in violation of any clearly established rights of plaintiff, and that petitioners were immune from suit under principles of qualified immunity. Before hearing on the motion, the Court appointed counsel for the indigent inmate. Appointed counsel was not directed by the Court to recast the complaint and counsel did not do so except that, at a later date, additional counts were added which are not currently involved in the Petition for Certiorari.

Based upon the evidence presented, the Court of Appeals agreed that the rectal search policy constituted an exaggerated response to purported prison security considerations and accordingly declined to give deference to petitioners' expert judgment (Pet. Appx. A-13, Footnote 9) as to the need for the search. The Court of Appeals agreed that the law was clearly established at the relevant time that such a highly intrusive and humiliating search must be reasonably related to a legitimate penological need (Pet. Appx. A-9) and that inquiry into punitive purpose was permissible because such is an element of the substantive claim for violation of respondent's constitutional

rights.[6] The Court of Appeals agreed that the case presented by respondent inmate was a substantial one; that specific, non-conclusory, and significant probative evidence had been presented which demonstrates the existence of a genuine issue of material fact as to whether the intrusive probe search policy and practice was done for punitive purposes, unrelated to legitimate penological needs.

II. REASONS FOR DENYING THE WRIT

A. The Ordinary Requirements of Fed. R. Civ. P. 56(c) and (e) are Applicable to a Motion for Summary Judgment Based Upon Grounds of Qualified Immunity.

A major premise is missing from petitioners' argument that no evidence was produced of the individualized conduct or responsibility of any named petitioner-defendant. Missing is petitioners' acknowledgment that that issue was never fairly or squarely presented to the trial court, or ruled upon. Petitioners did allege as an affirmative defense 'failure to state a cause of action,' Fed. R. Civ. P. 12(b)(6); however, petitioners did not bring on for hearing any issue of pleading insufficiency.

---

[6]At the Court of Appeals level, petitioners unsuccessfully argued that the district court erred as matter of law by inquiring into purpose or motivations for the search. Here, however, the Questions Presented limit inquiry in that area to the *standard of proof* required if an inquiry into such matter is made.

Pursuing their motion for summary judgment insofar as it was based on qualified immunity, petitioners made certain definitive contentions regarding qualified immunity. However, petitioners made only oblique reference, if at all, to the issue of *the sufficiency of evidence* of individualized conduct.[7] Petitioners made no attempt to demonstrate that respondent had no evidence to prove his case against any named defendant; indeed petitioners did not even make a "conclusory assertion" that respondent had no such evidence. See Celotex Corp. v. Catrett, 477 U.S. 325, 328 (1986) (Justice White, concurring).

No ruling was made by, or requested of, the District Court as to the issue of the sufficiency of evidence of individualized conduct. After issuance of the District Court's opinion, petitioners made no motion to have the Court reconsider its opinion to address that issue. The Court of Appeals declined to consider the issue for the first time on interlocutory appeal,

---

[7]The only references known to respondent are as follows: Petitioner's Reply Brief (Ct. Rec. 40) to the District Court referenced the heightened pleading requirement which requires, for purposes of qualified immunity, that the complaint contain specific, non-conclusory factual allegations against each individual defendant (Ct. Rec. 40, pp. 2-3); that brief also noted that respondeat superior and vicarious liability theories are not applicable (Ct. Rec. 40, p. 3 and 4). Finally, in colloquy at oral argument, the District Court asked a general question of counsel for petitioners regarding the relative responsibility of those who establish the policy and those who implement it (Ct. Rec. 20, lines 6-11). However, in response, counsel then representing petitioners did not pursue or advance the issue.

holding that the record disclosed that "no named defendant has attempted to make such a [necessary] showing" on that issue (Pet. Appx. A-13).[8]

Harlow v. Fitzgerald, 457 U.S. 800 (1982), did not abrogate in qualified immunity cases the customary burdens imposed by Fed. R. Civ. P. 56(c) and (e) upon a moving party that there is no genuine issue as to a material fact. See Halperin v. Kissinger, 807 F.2d 180, 189 (Justice Scalia, sitting as designated Circuit Justice) (D.C. Cir. 1986); also see Green v. Carlson, 826 F.2d 647, 651 (7th Cir. 1987): "The Supreme Court clearly has envisioned that the issue of qualified immunity may arise in the context of a summary judgment motion, and has given no indication that the district court ruling on a motion for summary judgment on grounds of qualified immunity should follow a different procedure than if summary judgment had been requested on other grounds. [citations omitted]" McSurely v. McClellan, 697 F.2d 309, 321, Ftn. 20 (D.C. Cir. 1982) ("Harlow does not purport to purport to change the operation of Rule 56 in immunity cases."

Celotex Corp. v. Catrett, 477 U.S. 317, 326, reaffirms that a party seeking summary judgment ". . . always bears the initial

---

[8]The Court of Appeals, in its Opinion at Footnote 10 stated, "Of course a named defendant may make such a showing at trial" (Pet. Appx. A-13).

responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." The Celotex court explained that a moving party is not necessarily required to produce evidence showing the absence of a genuine issue of material fact: "Instead, as we have explained, *the burden on the moving party may be discharged by "showing"--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case.*" Id., 477 U.S. 325 (Emphasis added).

One of the obvious purposes of requiring the moving party to make a *"showing"* as to the absence of evidence as to a major element of the plaintiff's case is to alert the non-moving party that he or she must come forth with the evidence to support that questioned element; such notice is required even when the court raises the issue sua sponte. Celotex Corp. v. Catrett, 477 U.S. 317, 326. Here no such notice given.

B. The Court of Appeals did not have Jurisdiction of the Issue of the Sufficiency of Evidence as to Individual Conduct.

A concommitant of the determination that the District Court did not rule, or decline to rule, on the issue of sufficiency of evidence of individual conduct is that on interlocutory appeal, the Court of Appeals would not have jurisdiction of that issue under 28 U.S.C. § 1291 or under the collateral order doctrine of

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541-561, 69 S. Ct. 1221 (1949). There has been no interlocutory decision, much less one which meets the Cohen three-part test as discussed in Mitchell v. Forsyth, 472 U.S. 511, 527, 105 S. Ct. 2806 (1985). Mitchell v. Forsyth holds that a district court's denial of a claim of qualified immunity is an applicable "final decision," within the meaning of 28 U.S.C. 1291 "to the extent that it turns on an issue of law," Id., at 530. Here the denial does not turn on the subject issue--there has been no ruling, or refusal to rule, on the subject issue of law.

C. In a Maximum Security Prison Setting, and in Response to a Claim of Qualified Immunity, What Evidence Will Suffice to Demonstrate the Existence of a Genuine Issue of Material Fact as to Whether the Proffered Justifications for a Prison Policy of Administering a Highly Intrusive Rectal Cavity Probe Search to Inmates are Pretextual.

Petitioners assert that the intent of Harlow v. Fitzgerald, 457 U.S. 800 (1982) would be defeated in a qualified immunity case if a plaintiff's case were able to survive a defendant's motion for summary judgment by showing circumstantial evidence or inference, however probative or significant, instead of direct evidence.

1. Respondent has Presented Direct, Significant and Probative Evidence that the Subject Search did not Serve Penological Needs.

Black's Law Dictionary, Revised Fourth Edition, defines "direct evidence" as follows:

> **DIRECT EVIDENCE.** Is that means of proof which tends to show the existence of a fact in question, without the intervention of the proof of any other fact, and is distinguished from circumstantial evidence, which is often called "indirect." See Brown; State v. Calder, 23 Mont. 504, 59 P. 903.

Parallelling that definition, respondent offered direct evidence which "tends to show the existence of a fact in question," i.e., that the rectal search policy was carried out in a manner and context which rendered the ostensible purpose of the search an absurdity and a gross exaggeration of a legitimate response to prison security needs. Respondent offered *direct evidence* that the only significant search of the person of the inmate being transferred to the IMU was of the rectal cavity. Other obvious and commonly used areas were not searched (clothing, hands, hair, mouth, nose, ears, etc.). That and other direct specific, significant, and probative evidence which controverted the proffered claim that the probe search was needed for legitimate penalogical purposes is outlined by the Court of Appeals in its opinion (Pet. Appx. A-9 to A-10). An even more complete listing of the evidence appears in the District Court opinion (Pet. Appx. B-4 to B-6 and B-12, fn. 1).

Such evidence clearly distinguishes this case from the "insubstantial claims" which Harlow at 813 said should be resolved on summary judgment, or claims which are premised upon "bare allegations of malice." Id. at 817, 818. Harlow clearly did not intend to place insuperable barriers in the way of substantial claims. Harlow at 819: "By defining the limits of

qualified immunity essentially in objective terms, we provide no license to lawless conduct." Harlow showed no animosity toward substantial cases; to the contrary, Harlow recognized that an action for damages may be "the only realistic avenue for vindication of constitutional guarantees." Harlow, at 814. That circumstantial evidence can be highly probative and trustworthy is evidenced by the fact that juries are commonly instructed that the law makes no distinction between the weight given either direct or circumstantial evidence and that one is not necessarily more or less valuable than the other. See e.g. Federal Jury Practice and Instructions, Devitt & Blackmore, Vol. 1, § 15.02. Proof of intent, motive or purpose are ordinarily proved by circumstancial evidence; indeed, such can rarely be established by any other means. Id. § 40.11. The court of appeals recognized the realities of the situation:

> In cases where the purpose of a prison regulation is at issue, there is no 'direct evidence' equivalent to legislative history that plaintiff's may examine. To hold plaintiffs in such cases to a 'direct evidence' standard would effectively insulate arbitrate governmental action from judicial scrutiny (Pet. Appx. A-12).

2. Turner v. Safley does not Denigrate Circumstantial Evidence.

Possibly the Court may conclude that the direct evidence presented by respondent only circumstantially tends to prove the punitive motivations or purposes of the search policy or practice, even though such evidence directly proves that the policy and practice was an exaggerated response to security

needs. Accordingly, respondent will below state his contentions as to the effect to be given probative and significant circumstantial evidence as to motivation.

Petitioners argue that Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987) presents policy considerations which mandate direct evidence standards in connection with any challenge to prison regulations (Pet. Appx. A-7, 8). Turner v. Safley employs a method of analysis which examines prison regulations by considering whether the regulation is "reasonably related to legitimate penalogical interests," or conversely is "an exaggerated response" to prison concerns. 482 U.S. at 78. Turner v. Safley determined that the subject prison restrictions of inmate correspondence did not violate the First Amendment but that restrictions on inmate marriages violated the inmate's constitutional rights regarding marriage. Significantly, Turner v. Safley did not conclude that circumstantial evidence could not be employed in testing the validity of the regulations; indeed, it is obvious that circumstantial evidence was employed in finding the marriage restriction unconstitutional. Certainly, there was no direct evidence in the form of past documentation, testimony, admission, or "legislative history" under and by which the prison authorities acknowledged the marriage restrictions to be an exaggerated response to legitimate penalogical needs. Admittedly, Turner v. Safley was not a qualified immunity case; however, it is evident that the case does not stand for the broad proposition which petitioner's advance, i.e., that only direct

evidence is competent to challenge whether a regulation is reasonably related to legitimate penalogical needs, or is an exaggerated response thereto.

3. Unless Near-Absolute-Immunity is to be Accorded, Reality Necessitates the Use of Probative and Significant Evidence, Including Circumstantial Evidence.

In the narrower context of qualified immunity, we submit that public policy considerations do not reflect the need for a highly restrictive direct evidentiary standard in cases of improper motive or purpose.[9]

Traditionally, circumstantial evidence has been relied upon in considering whether a § 1983 substantive violation has been shown. See Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985) which involved a § 1983 claim of discrimination:

> In the equal protection context, just as in a Title VII disparate treatment case, discriminatory intent need not be proved by direct evidence. '[D]etermining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as maybe available.'Rogers v. Lodge, 458 U.S. 613, 102 S. Ct. 3272, 3276, 73 L.Ed.2d 1012 (1982) quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266, 97 S. Ct.

---

[9]Consider here the need for a heightened evidentiary standard, which is conceptually distinct from the heightened pleading standard of Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984) that requires "non-conclusory allegations of evidence of such [unconstitutional motive] or intent," Id. at 29, and that requires allegations of "specific facts to support a claim of unconstitutional motive." Id. at 30.

555, 564, 50 L.Ed.2d 450 (1977); citing Washington v. Davis, 426 U.S. at 242, 96 S. Ct. at 2049.

A highly restrictive standard calling for direct evidence only would have far reaching implications as to qualified immunity from an alleged equal protection violation involving discriminatory intent; from an Eighth Amendment case claiming cruel and unusual punishment which requires a showing of "deliberate indifference"; from liability for sanctions or discharge of employees made for pretextually valid reasons but actually based upon improper purposes in violation of First Amendment rights, etc. See *"Qualified Immunity for Governmental Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation,"* 95 Yale Law Journal 126, 135-136.

Respondent submits that the realities are such that an evidentiary standard which would reject specific, non-conclusory, probative and significant circumstantial evidence as being insufficient to evidence improper purpose or motivation is essentially tantamount to a grant of absolute immunity. Harlow v. Fitzgerald declined to grant or endorse absolute immunity.

4. Cases Relied upon by Petitioners Calling for a Direct Evidence Standard are Distinguishable, Unpersuasive and do not Merit Grant of Certiorari in this Case.

A case primarily relied upon by petitioners, Martin v. D.C. Metropolitan Police Dept., 812 F.2d 1425, vacated in part 817 F.2d 144 (Sec. IV of opinion and dissenting opinion)

reh'g. denied 824 F.2d 1240 (Sec. IV of Opinion, dissenting opinion, and judgment reinstated) (D.C. Cir. 1987) stated a rule calling for direct evidence but did so before ascertaining the quality of evidence which would be unveiled by plaintiff upon the limited discovery which the D.C. Court of Appeals authorized. Thus, the standard was enunciated in an abstract situation, without benefit of knowing how probative or significant the evidence in that case. The standard was not there applied in relation to specific facts.

As noted by the Court of Appeals in the instant case (Pet. Appx. A-12), Martin is also factually distinguishable from the present case. The core of Martin's complaint was that the defendant officers were "animated by improper motives in deciding to pursue his arrest and indictment." Martin, 812 F.2d at 1429. Martin had to demonstrate subjective malice directed at him; at hand, the issue addresses a larger inquiry and a fact situation which is not comparable, an overall policy and practice which is absurd, exaggerated and has punitive impact. A more general and non-specific intent is involved; certainly respondent need not evidence that petitioners harbored special animus toward him.

Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988), also relied upon by petitioners, was before the court in circumstances somewhat similar to those in Martin. Poe v. Haydon involved an inquiry whether a government employee's assignment to certain work which needed to be done was motivated by gender-based animus. At 432, the Court stated that the act of assigning an employee to that

lawful and proper work was deemed to be a neutral act[10] which could only be made unlawful by a specific motive or intent. Following the lead of Martin, the Sixth Circuit held that direct evidence of such improper motivation must be presented, i.e., "something more than inferential or circumstantial support for [her] allegation of unconstitutional motive." Poe v. Haydon at 432. Like Martin, Poe v. Haydon was decided in advance of the actual identification of the evidence which the plaintiff could present.

5. The Focus should be on the Substantiality of the Evidence and not upon an Arbitrary Classification of Evidence.

A more common approach is taken in Wright v. South Arkansas Regional Health Center, Inc., 800 F.2d 199, 204, 205 (8th Cir. 1986), which was cited in Poe v. Haydon, supra. In Wright, it was held that certain murky evidence held did not create a genuine issue of material fact. Subjective analysis was made as to the quality and sufficiency of the evidence. A subjective analysis as to sufficiency of evidence commonly occurs in summary judgment review, with the focus being upon the substantiality of the evidence and not upon an arbitrary, unbending classification. Granted, the Martin and Poe v. Haydon courts were not dealing with summary judgment generally, but were

---

[10] In contrast, the act of searching the rectal cavity for contraband and not searching other obvious, commonly used areas of the body, is hardly a "neutral act."

concerned with not allowing a case based on unsubstantial evidence to survive summary judgment. Nevertheless, the public policy interest of achieving early termination of any insubstantial litigation is of great importance, see Celotex, supra, and subjective analysis has proven its own merit in those cases.

Other courts have found circumstantial evidence to the trustworthy in a qualified immunity setting. Turner v. Dammon, 848 F.2d 440 (4th Cir. 1988), was a qualified immunity case in which circumstantial evidence was found to be highly persuasive. In that case, the owners of a topless bar claimed they were being subjected to selective searches in violation of clearly established Fourth Amendment law. Their bar had been visited or searched by the officers at least 100 times, substantially more frequently than any other bar, all without productive results and without objective basis. The Fourth Circuit Court of Appeals was sufficiently persuaded by the circumstantial evidence which had been presented that it suggested partial summary judgment as to liability "if no supplementary explanation of the defendants' conduct is added to the record." Id. at 447. Lowe v. City of Monrovia, 775 F.2d 998 (9th Cir. 1985).

Also, see Pueblo Neighborhood Health Centers v. Losavio, 840 F.2d 642, 648-650 (10th Cir. 1988) in which the Tenth Circuit broadly agreed with the certain aspects of Martin v. D.C. Metropolitan Police Dept., supra, but which nevertheless did not adopt the "direct evidence" standard of Martin. In Pueblo, the

Tenth Circuit stated that in cases involving qualified immunity of a governmental officials "the plaintiff may avoid summary judgment only by pointing to *specific evidence* that the official's actions were improperly motivated" (emphasis added). Pueblo, at 649; further, at fn. 5:

> This court has imposed an analogous burden of on antitrust conspiracy plaintiffs. See e.g., Bright v. Moss Ambulance Service, Inc., 824 F.2d 819, 824 n. 6 (10th Cir. 1987) (mere conclusory allegations do not establish an issue of fact under Fed R. Civ. P. 56); Instructional Sys. Dev Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 639, 644 (10th Cir. 1987) ("Allegations . . . must be supported by *significant probative evidence* in order to overcome a motion for summary judgment.") (emphasis added).

It appears implicit that the Pueblo court recognized that the direct evidence standard of Martin and of Poe v. Haydon is too restrictive.

The constitutional interests are also dissimilar. Protection of the interests involved in the present case (sanctity of the human body against exaggerated, punitive and unreasonable searches) would not be served by the evidentiary standard proposed by petitioners. Stark, compelling evidence and circumstances such as are at hand were not before the courts in Martin or in Poe v. Haydon. With due respect to those courts, it is submitted that it is doubtful that those courts would have used the same language had they been confronted at that time with this evidence. Neither decision gave any exposition as to the larger implications, workings, or impact of the direct evidence

standard. A conflict between circuits should not be found where such implications and workings of the direct evidence standard have been so insufficiently tested, and where it is not at all clear that those circuits which have announced that rule would apply it to the circumstances at hand.

With due respect to those courts, respondent submits that the direct evidence standard is misguided and represents an over-kill. The instant case, which bears no factual correspondence to either Martin or Poe v. Haydon, and which involves dissimilar constitutional interests, is not the case for the Supreme Court to make a pronouncement regarding direct evidence vs. circumstantial evidence in qualified immunity cases.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted this 15th day of March, 1989.

Leo J. Driscoll
Winston & Cashatt, Lawyers
1900 Seafirst Financial Center
Spokane, WA 99201
1-509-838-6131
Counsel for Respondent

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAR 14 1988

JAMES R. LARSEN, Clerk
_____ Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

LANFORD D. TRIBBLE, Plaintiff, vs. BOOTH GARDNER, et al., Defendant.	NO. C-86-234-JLQ ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS AND ORDER OF PARTIAL DISMISSAL WITH PREJUDICE

BEFORE THE COURT is defendants' Motion to Dismiss Defendants Gardner, Worden, John Doe 1 and John Doe 2 (Ct. Rec. 114).

Plaintiff's response (Ct. Rec. 118) indicates that he has no objection to the dismissal of Booth Gardner. Therefore, the complaint and the claims therein are **DISMISSED WITH PREJUDICE** as to defendant Booth Gardner.

As to defendants John Doe 1 and John Doe 2, plaintiff states in his response that those defendants were dismissed in an order filed prior to the filing of plaintiff's amended complaint. Plaintiff also states that he has no objection to the dismissal of defendants John Doe 1 and John Doe 2 if the

AO 72
(Rev.8/82)

court determines that a further order of dismissal as to those defendants is necessary.

In his amended complaint (Ct. Rec. 106), plaintiff again names defendants John Doe 1 and John Doe 2. As plaintiff does not object to their dismissal, the complaint and the claims therein are **DISMISSED WITH PREJUDICE** as to defendants John Doe 1 and John Doe 2.

Finally, defendants argue that the court should dismiss defendant Steve Worden because plaintiff has failed to allege acts on the part of that defendant which amount to a constitutional violation and because the court does not have personal jurisdiction over that defendant. As to the second argument, defendants allege that the court has no personal jurisdiction over defendant Worden because that defendant did not engage in conduct in Washington which violated plaintiff's constitutional rights, nor in tortious conduct, and the Washington Long-Arm Statute therefore does not confer jurisdiction over defendant Worden. Thus, the validity of the second argument depends upon the validity of the first.

In the first argument, defendants argue that plaintiff has failed to state a claim against defendant Worden because the complaint alleges only that defendant Worden made derogatory comments to plaintiff prior to the digital-rectal

AO 72
(Rev.8/82)

probe and that threats do not state a cognizable 42 U.S.C. § 1983 action. Defendants correctly argue that threats alone will not state a cause of action pursuant to 42 U.S.C. § 1983 for violation of a prisoner's Eighth Amendment rights.

In this case, however, plaintiff also alleges that the defendants' conduct violated his Fourth Amendment right to be free from unreasonable searches. In Bell v. Wolfish, 441 U.S. 520 (1979), the United States Supreme Court stated the relevant inquiry in determining the validity of a search of a prisoner. In that case, the court held that "each case requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Id. at 559 (Emphasis added, citations omitted). Although the court's holding stated that the Fourth Amendment does not bar all visual cavity searches, the court also stated in dicta that such searches must be conducted reasonably and that searches conducted abusively may violate a prisoner's Fourth Amendment rights. Id. at 560.

In his amended complaint (Ct. Rec. 106), plaintiff alleges that defendant Worden made an abusive statement to

plaintiff sometime prior to a digital-rectal probe. Defendants have not established or even argued that the statement was so unrelated to the search that the court could not consider it in determining if the search was unconstitutionally abusive, nor have defendants established or argued that the statement was insufficient to render the search unconstitutionally abusive. Therefore, defendants' motion to dismiss is **DENIED** to the extent defendants seek the dismissal of defendant Worden for failure to state a claim as to that defendant. Accordingly,

IT IS ORDERED:

1. As to defendant Booth Gardner, defendants' Motion to Dismiss is **GRANTED**; the complaint and the claims therein as to him are **DISMISSED WITH PREJUDICE.**

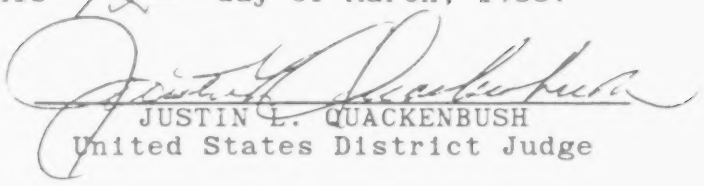
2. As to defendants John Doe 1 and John Doe 2, defendants' Motion is **GRANTED**; the complaint and the claims therein as to them are **DISMISSED WITH PREJUDICE.**

3. As to defendant Steve Worden, defendants' Motion is **DENIED.**

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

72
v 8/82)

DATED this 12th day of March, 1988.



JUSTIN L. QUACKENBUSH
United States District Judge

AO 72
(Rev. 8/82)

Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1259

IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1988

BOOTH GARDNER, et al.,

Petitioners,

v.

LANFORD D. TRIBBLE,

Respondent.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH O. EIKENBERRY
Attorney General

WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record

GLENN L. HARVEY
Assistant Attorney General

7th Floor, Highway-Licenses Building
Mail Stop FZ-11
Olympia, Washington 98504
(206) 586-1445

STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

TABLE OF AUTHORITIES

Cases

	Page
Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1988)	6
Halperin v. Kissinger, 807 F.2d 180 (D.C. Cir. 1986)	6, 7
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	2, 6
Martin v. District of Columbia Police Department, 812 F.2d 1425 (D.C. Cir. 1987), vacated in part, 817 F.2d 144, reinstated sub nom. Bartlett v. Bowen, 824 F.2d 1240, cert. den. ___ U.S. ___, 108 S. Ct. 1121 (1988)	4-7
Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988) cert den. ___ U.S. ___, 108 S.Ct. 788 (1989)	5,6,7

Statutes and Regulations

42 U.S.C. § 1983	3

Other Authorities

Brief in Opposition	1, 5
Petition for Certiorari	3

No. 88-1259

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1988

BOOTH GARDNER, et al.,

Petitioners,

v.

LANFORD D. TRIBBLE,

Respondent.

PETITIONERS' RESPONSE TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ARGUMENT

I. Introduction

In his brief in opposition, respondent Tribble makes essentially two arguments. The first is procedural; he argues that the petitioners did not "fairly or squarely" present to the District Court their contention that Mr. Tribble failed to show any illicit punitive intent on the part of any specific petitioner[1] (Brief in Opposition, p. 5). The second is more substantive; he argues that failure to show such intent is not fatal to his case. More specifically, Tribble argues that the petitioners' claim of qualified im-

[1] Significantly, respondent Tribble does not even allege that he adduced any evidence illustrating the punitive intent of any particular defendant.

munity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) can be defeated simply by showing that some sort of punitive intent might be inherent in the contested search policy itself, regardless of the lack of punitive intent on the part of any individual petitioner. Under this argument, punitive intent in the abstract will apparently suffice; there is no need to show who did the intending.

We take up each argument in turn.

II. The petitioners clearly pointed out to the District Court their contention that Tribble had failed to show any illicit punitive intent on the part of any specific petitioner.

In our reply brief before the district court, we stated as follows:

> Additionally, a 42 U.S.C. § 1983 complaint must set forth with precision a specific factual basis upon which plaintiff claims each defendant is liable. Fed.R. Civ.P. 8(a)(2); *Aldabe v. Aldabe*, 616 F.2d 1088, 1092 (9th Cir. 1980). Even a liberal interpretation of a civil rights complaint (only done in *pro se* pleadings) may not supply essential elements of a claim that are not initially pled. *Ivey v. Board of Regents*, 673 P.2d 266, 268 (9th Cir. 1982). A complaint will not be sufficient to state a claim if the allegations are mere conclusions unsupported by specific facts. *Id.*, *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). It is incumbent upon the plaintiff to allege with at least some degree of particularity overt acts which defendants engaged in which support plaintiff's claim. *Sherman*, 549 F.2d at 1290.
>
> Moreover, defendants' liability in civil rights cases must be personal; *respondeat superior* and vicarious liability theories are not applicable [citing cases] (Defendants' Reply Brief, pp. 2-3).

The District Court, to be sure, paid no attention to these contentions, and obviously failed to recognize their critical importance. But it was not because of lack of effort on petitioner's part, as these excerpts show. And for this reason, the Court of Appeals had jurisdiction of the issue

of the sufficiency of the evidence as to the intent of specific, individual petitioners. Indeed, the sufficiency of the evidence was crucial to the District Court's and the Court of Appeals' denial of qualified immunity.

In contrast to the District Court, the Court of Appeals addressed these contentions very explicitly. See Pet. Appendix A-12 and A-13. Whether it did so correctly is another matter, of course, and that is the major issue presented in our petition for certiorari. We turn next to that issue.

III. **The holding of the Court of Appeals on the issues of evidence of intent and causation present important questions regarding the scope of the qualified immunity defense in a § 1983 damage action.**

If this case involved solely a challenge to the validity of a prison policy, brought in the form of a declaratory judgment or injunctive action, petitioners would have little quarrel with the substantive arguments made by Mr. Tribble in his brief in opposition. Indeed, if that were all this case involved, the petition for certiorari would not have even been filed in the first place.

But this case involves much more; it involves an effort by Mr. Tribble to bring to trial all the state officials and employees in any way associated with that policy, and to extract money from them through a damage award under 42 U.S.C. § 1983. That element of the case—which is the sole element involved in our petition, raises important questions which should be decided by this Court. Those questions are:

1. **Must the plaintiff present some "direct evidence" of a defendant's improper purpose to defeat summary judgment based on qualified immunity?**
2. **Does the fact that a prison *policy* is at issue jettison the 42 U.S.C. § 1983 requirement that conduct by a specific named**

defendant caused the alleged constitutional deprivation?

Regarding the showing required to force the defendants to trial, consider, for example, Mr. Tribble's basis for distinguishing *Martin v. District of Columbia Police Department*, 812 F.2d 1425 (D.C. Cir. 1987), vacated in part, 817 F.2d 144, reinstated sub nom. *Bartlett v. Bowen*, 824 F.2d 1240, *cert. den.* ___ U.S. ___, 108 S.Ct. 1121 (1988) (which established a "direct evidence standard).

> As noted by the Court of Appeals in the instant case (Pet. App. A-12), *Martin* is also factually distinguishable from the present case. The core of Martin's complaint was that the defendant officers were "animated by improper motives in deciding to pursue his arrest and indictment." *Martin*, 812 F.2d at 1429. Martin had to demonstrate subjective malice directed at him; at hand, the issue addresses a larger inquiry and a fact situation which is not comparable, an overall policy and practice which is absurd, exaggerated and has punitive impact. A more general and non-specific intent is involved; * * *—Brief in Opposition, p. 15.

The Court of Appeals took this same approach toward the intent issue. In distinguishing *Martin*, it stated:

> Here, in contrast, we are not concerned with the defendants' subjective malice in conducting the particular search upon Tribble; rather, Tribble asks us to examine the purpose of the policy requiring such searches. * * * In cases where the purpose of a prison regulation is at issue, there is no "direct evidence" equivalent to legislative history that plaintiffs may examine. To hold plaintiffs in such cases to a "direct evidence" standard would effectively insulate arbitrary governmental action from judicial scrutiny. (Pet. Appendix A-12.)

Regarding evidence of individual defendant culpability, the Court of Appeals went on to state:

> Defendants also assert that Tribble has failed to produce sufficient evidence linking any named defendant either to the particular search of him or to the creation of the digital rectal search policy. The difficulty, as defendants view it, is that Tribble has not ade-

> quately alleged that any of the named defendants harbored an unconstitutional motive. Tribble's suit, however, is not based upon the particular subjective intent of the defendants; rather it is based upon the purpose of the policy. (Pet. Appendix A-13)

In short, under the approach urged by Mr. Tribble and adopted by the Court of Appeals, the intent of any particular defendant is completely irrelevant. Under the analysis utilized below, it is the intent or "purpose" of *the policy* that is critical, and that is apparently to be determined in the abstract, i.e., without the need for any evidence regarding the conduct, intent, purpose, or motivation of any particular person.

This approach, petitioners would agree, might well make sense in a challenge to a policy mounted only through a declaratory judgment or injunctive action. But it makes no sense when applied in a damage action under § 1983, which imposes liability for damages upon "every person" who deprives a citizen of his constitutional rights. That causation requirement is the reason for our insistence upon both "direct" evidence and a link to each named defendant in the formulation and implementation of the challenged policy which is to be defended at trial.

Contrary to the suggestion of Mr. Tribble, our point is not that one type of evidence, *e.g.*, "direct," is, in the abstract, necessarily more reliable and probative than another, *e.g.*, "circumstantial." (See Brief in Opposition, pp. 9-19.)

Rather, the point is that, in order to force a § 1983 defendant *to trial*, the plaintiff must meet a burden of showing at least a modicum of evidence which establishes the link with the improper conduct of each named defendant from whom the plaintiff is trying to extract damages. *Martin* and *Poe v. Haydon*, 853 F.2d 418 (6th Cir. 1988) cert. den. ___ U.S. ___, 109 S. Ct. 788 (1989) recognized that §1983 imposes such a burden in a damage action, while the Court of Appeals in this case held that no such burden exists. It is this burden which *Martin* and *Poe* were referring to when they required "direct" evidence which is

"more than inferential or circumstantial." *Poe*, 853 F.2d at 432. *See also Martin*, 812 F.2d at 1435.

Next, a word about the nature of that link in light of the holdings of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Anderson v. Creighton*, 107 S.Ct. 3034, 3039 (1988) that subjective intent is to play no role in applying the qualified immunity defense in damage actions against public officials. Under *Harlow* and *Anderson*, the question is whether *objectively viewed*, the individual named defendants could have reasonably believed their actions were proper under existing law. When the *Harlow* and *Anderson* requirements are combined with the § 1983 requirement of showing a causal link with each individual defendant, the burden is upon the plaintiff to show, through evidence specific to each named defendant, that such a reasonable belief could not have existed. Our point is simply that Mr. Tribble has here made no such effort, and he contends no such effort need even be made.

Note that under the approach of Mr. Tribble and the Court of Appeals, any defense of qualified immunity is inevitably swept aside. Once a factual dispute as to the purpose of a prison policy is raised—as is easily done with respect to any prison policy about which there may be a fair difference of opinion—all prison officials and employees in any way associated with that policy will be automatically immersed in that dispute, and the defense of qualified immunity will never be available to relieve them from the burdens of discovery and trial.

Prison officials should not be put in such an impossible position.

A final word regarding *Harlow*. Despite our reliance upon *Harlow*, we candidly recognize that its contours are not entirely clear. How should it be applied in a situation in which an improper subjective motive is itself a necessary element of the constitutional violation? Justice Scalia (sitting as Circuit Judge) phrased the problem this way in *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986):

The problem, however, is that whether (in the words

> of the *Harlow* test) "conduct does not violate clearly established * * * rights," 457 U.S. at 818, 102 S.Ct. at 2738, often, if not invariably, depends upon the intent with which the conduct is performed. And it is impossible to place "[r]eliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law," *id.* (footnote omitted), when clearly established law makes the conduct legal or illegal depending upon the intent with which it is performed. That is precisely the situation here. 807 F.2d at 184.

This is the same problem with which the same Circuit struggled in *Martin* and the Sixth Circuit struggled in *Poe*. *See Martin*, 812 F.2d at 1432-1435, and *Poe*, 853 F.2d at 431. As *Halperin*, *Martin*, and *Poe* show, the problem is not confined to cases involving prison policy; it can arise in a whole variety of contexts. And the case at bar provides the opportunity for this Court to deal with it.[2]

For the reasons given above and in our petition for certiorari, the petition should be granted.

DATED this 10th day of April, 1989.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

WILLIAM L. WILLIAMS
Sr. Assistant Attorney General
Counsel of Record

GLENN L. HARVEY
Assistant Attorney General

Department of Corrections
Mail Stop FZ-11
Olympia, WA 98504
(206) 586-1445

---

[2] The Ninth Circuit in the case at bar may well have thought it could finesse the problem, by focusing upon the policy rather than upon the conduct or motive of the individual defendants. The result will be to force every policy-oriented case to trial, since qualified immunity will be easily defeated.